LL.B. V Term

LB- 5034- International Trade Law

Course materials Selected and Edited by

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UNIVERSITY OF DELHI
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(For private use only in the course of instruction)

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5. Agreement on Trade Related Investment Measures (Text)
6. *Application of Article 1:1 to Rebates on Internal Taxes* [*India Tax Rebates on Exports*] (1948); II GATT B.I.S.D.12
7. European Communities — Regime for the Importation, Sale & Distribution of Bananas, WT/DS 27, 5 Feb., 1996 73
8. *Japan-Taxes on Alcoholic Beverages* case, Complaints by the European Communities, Canada, and the United States against Japan, (WT/DS8, DS10, DS11), Appellate Body and Panel Reports adopted on 1 November, 1996.
9. India – Measures Affecting the Automotive Sector WT/DS146/R, 5 April, 2002 87
10. U.S. –Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India WT/DS 436/AB/R (19 December 2014) 90
11. *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS400/AB/R and WT/DS401/AB/R (adopted 18 June2014)
12. *United States-Anti-dumping and Countervailing Measures on Steel Plate from India,* Complaint by India against US, WT/DS 206, 19 Feb., 2003
13. *United States- Countervailing and Anti-dumping Measures on Certain Products from China* case, Complaint by China against US, WT/DS 449, 7 July, 2014.
14. *China-Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* case, Complaint by US against China, WT/DS 440, 18 June, 2014
15. *Canada-Certain Measures Relating to the Renewable Energy Sector*, WT/DS412/AB/R (24 May 2013)
16. *India-Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS 456, 6 Feb. 2013 97
17. *Union of India &Ors v M/S Kumho Petrochemicals Co. Ltd &Ors (2017)8SCC 307* 101
18. *Eveready Industries India Ltd v Union of India & Ors. (2019) SCC OnLine Del 7865* 114
19. *Contship Container Lines Ltd. v. D.K. Lall (2010) 4 SCC 256* 132
20. *Shipping Corporation of India v. Bharat Earth Movers Ltd. (2008) 2 SCC 79* 139
21. *Humboldt Wedag India Pvt. Ltd. V. Dalmia Cement Ventures Ltd. (2010) SCC OnLine Del 3383* 143

PART I

Prescribed Books/Chapters:

1. Raj Bhala, *International Trade Law: A Comprehensive Textbook* (4 Vols), (5th ed.) Carolina Academic Press (2019)
2. Carole Murray, David Holloway, *Schmitthoff: The Law and Practice of International Trade*, (12th edn.) Sweet & Maxwell(2015)
3. Autar Krishen Kaul, *A Guide to the W.T.O. and GATT: Economics, Law, and Politics*, Kluwer Law International (2006)
4. James J. Nedumpara, *Injury and Causation in Trade Remedy Law: A Study of WTO Law and Country Practices* (1st edn.) Springer (2016)
5. Autar Krishen Kaul, 'WTO Dispute Settlement Mechanism: A Fresh Look', 25 *Delhi Law Review* (2003) 67-102

Prescribed Agreements/Instruments:

1. General Agreement on Tariffs and Trade, 1994
2. Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994
3. Agreement Establishing the World Trade Organization, 1994
4. Agreement on Subsidies and Countervailing Measures, 1994
5. Agreement on Implementation of Article VI (Dumping) of GATT, 1994
6. General Agreement on Trade in Services, 1994
7. Agreement on Trade Related Investment Measures, 1994
8. Agreement on Trade Related Intellectual Property Rights, 1994

Topic 1: Origin and Evolution of GATT & WTO.

Global Economics and International Trade Law

Protectionism *and* Free Trade theories

The Havana Charter & Birth of GATT,1947

GATT Rounds of Negotiation

GATT 1994 & The WTO: Its Genesis (Uruguay Round 1986 to1994)

WTO Agreements, Understandings, Annexes, Membership

Objective, Functions and Structure of WTO (Key Organs/Bodies)

Decision - Making Process, Voting, Amendment, Waiver etc.

Topic 2: Dispute Settlement Procedures under GATT and WTO

Dispute settlement under GATT: Article XXII, Article XXIII, its merits &de-merits

Difference between the GATT and WTO dispute settlement procedures

Dispute Settlement Procedure under the WTO charter (refer Agreement on Dispute Settlement Understanding), Consultation, Dispute Panel Body, Appellate Body, Implementation of findings/decisions of WTO Dispute Settlement Body (Refer Article XXV GATT)

Topic 3: The Principles of Non-Discrimination in GATT & WTO

Most-Favoured-Nation Treatment (MFN) under Article 1 of GATT 1947: its background, history, meaning, scope, significance & advantages; Meaning and scope of 'like-product'.

Exceptions to MFN (Annexes A to F of Article 1, Customs Unions and Free Trade Areas (Art. XXXIV), Generalized System of Preferences (Art XXV), Art. XXXV, Art XXV, Art. XX, Art XXI, XII-XVIII, Art. VI, Subsidies Code and Government Procurement Code, Art XXIII, XIX (Escape Clause); Regional Associations like NAFTA, EU, BRICS, SAFTA, TTIP, RCEP etc.

National treatment principle (NT) under Article III, GATT: its Origin & Scope, Meaning, Methodology.

Exceptions to National Treatment Principle.

Cases:-

1. *Application of Article 1:1 to Rebates on Internal Taxes* [*India Tax Rebates on Exports*] (1948); II GATT B.I.S.D.12, available at https://www.wto.org/english/tratop_e/dispu_e/gatt_e/48taxexp.pdf

2. *Japan-Taxes on Alcoholic Beverages* case, Complaints by the European Communities, Canada, and the United States against Japan, (WT/DS8, DS10, DS11), Appellate Body and Panel Reports adopted on 1 November,1996, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/8ABR.pdf&Open=True

3. *India – Measures Affecting the Automotive Sector* case, Complaint by US & EU against India, WT/DS146/R, 5 April,2002, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/175ABR.pdf&Open=True

4. *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS400/AB/R and WT/DS401/AB/R (adopted 18 June2014), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/400ABR.pdf&Open=True

5. *United States- Certain Measures on Steel and Aluminum Products, DS 547 (2019)*

6. *United States- Certain Measures Relating to the Renewable Energy Sector, DS 510 (2019,* available at*https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/510R.pdf&Open=True*

Topic 4: Subsidies and Countervailing Measures

Identification of Subsidies that are subject to the SCMAgreement.

Definition of 'Subsidy', 'Specificity'.

Regulation of Specific Subsidies

Prohibited Subsidies

Actionable Subsidies

Non- actionable Subsidies

Dispute Settlement and Remedies

Cases:-

1. *U.S. –Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products From India*, WT/DS 436/AB/R (19 December2014), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/436ABR.pdf&Open=True
2. *Canada-Certain MeasuresRelating to the Renewable Energy Sector*, WT/DS412/AB/R (24 May2013), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/412ABR.pdf&Open=True
3. *India – Measures Concerning Sugar and Sugarcane*, DS 579 & 580 & 581 (2020)
4. *India-Export Related Measures, DS 541(2019), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/541R.pdf&Open=True*

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Topic 5: Dumping and Anti-Dumping Duties

Anti-dumping: A Basic Overview

Anti-dumping Investigations

- i) Initiation
- ii) Evidence used in the Investigation
- iii) Key substantive issues: Dumping, injury and causation

Anti- dumping Measures

- i) Provisional measures
- ii) Price undertakings
- iii) Duration & review of duties
- iv) The use of Anti-dumping Measures other than Tariff Duties

Challenging AD measures in WTO DisputeSettlement

- v) Standard ofReview
- vi) The measures to be challenged
- vii) Good faith, Even-handedness, Impartiality

Cases:

1. *United States-Anti-Dumping and Countervailing Measures on Steel Plate from India* case, Complaint by India against US, WT/DS 206, 19 Feb., 2003, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/206R-00.pdf&Open=True
2. *United States- Countervailing and Anti-dumping Measures on Certain Products from China* case, Complaint by China against US, WT/DS 449, 7 July,2014, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/449ABR.pdf&Open=True
3. *China-Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* case, Complaint by US against China, WT/DS 440, 18 June,2014, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/440R.pdf&Open=True
4. *Union of India &Ors v. M/S Kumho Petrochemicals Co. Ltd (2017) 8 SCC 307*
5. *Eveready Industries India Ltd v Union of India & Ors (2019) Delhi HC*

Topic 6: Services, Investment & Intellectual Property

The scope of GATS

General obligations and disciplines

MFN Principle (GATS Article II & Annex)

Domestic regulations (GATS Article VI)

Exceptions (GATS Article XIV)

Specific commitments (GATS Parts III-IV)

Market access

National treatment

Objective and Coverage of TRIMs

National Treatment and Quantitative Restrictions, Inconsistent TRIMs

Notification & Transitional Agreements, Transparency

Provision for Developing Country Members

Objective and Coverage of Agreement on Trade Related Intellectual Property Rights (TRIPS), 1994

Cases:-

1. *US- Measures Affecting The Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/285ABR.pdf&Open=True

2. *India-Certain Measures Relating to Solar Cells and Solar Modules* case, Complaint by US against India, WT/DS 456, 16 September 2016, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/285ABR.pdf&Open=True

PART- II

Prescribed Books/Chapters:

1. Indira Carr, *International Trade Law*, (5th edn.) Routledge (2014)
2. Jason Chuah, *Law of International Trade*, (5th edn.) Sweet & Maxwell (2013)
3. John Head, *General Principles of Business and Economic Law* (1st ed.) Carolina Academic (2008)
4. Simone Schnitzer, *Understanding International Trade Law*, Universal (2006)
5. Rahmatullah Khan (ed.), *Law of International Trade Transactions*, N.M. Tripathi (1973)
6. Anupam Jha, 'Law Relating to Letter of Credit: An Examination of Judicial Response in India', in V.K. Ahuja (ed.), **International Law: Emerging Trends**, Forthcoming 2020

Prescribed Agreements/Instruments:

1. UNCITRAL Convention on International Bills of Exchange and International Promissory Notes, 1988
2. UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008
3. Uniform Customs and Practice for Documentary Credits 600, 2007
4. International Convention for the Unification of Certain Rules Relating to Bill of Lading, 1924 and its Protocol of 1968

Topic 7: Export Trade transactions and International Commercial Contracts

Standard Trade Terms (CIF, FOB, FAS)

Formation and Enforcement of International contracts

Rights & Liabilities of Parties to Contracts

Case:-

Contship Container Lines Ltd. v. D.K. Lall (2010) 4 SCC 2

Topic 8: Payments in International Trade

Bills of Exchange

Law Relating to Bills of Exchange

Commercial Credit in InternationalTrade

Letter of Credit: Types and the Law Relating to Commercial Credit

Case:-

Humboldt Wedag India Pvt. Ltd. V. Dalmia Cement Ventures Ltd. (2010) SCC OnLine Del 3383

Topic 9: Carriage of Goods in Export Trade

Carriage of Goods by Sea

Bills of lading and Charter Parties

Rights and Liabilities of the Parties to Contract of Carriage

Case:-

Shipping Corporation of India v. Bharat Earth Movers Ltd. (2008) 2 SCC 7

LL.B. V Term Examination, 2017

Paper LB- 5036

International Trade Law

Time:3hours Maximum Marks:100

Note: *Attempt at least one question from each part and five questions in all.*

PART I

Q. No. 1. Discuss briefly the developments leading to the establishment of WTO, 1995. Also discuss the differences between WTO 1995 and GATT 1948.

Q. No. 2. Discuss the rules governing 'MFN Treatment' and 'National Treatment'. Why are they considered as the core principles governing the WTO? Support your answer with the help of WTO decisions.

Q. No. 3. (a) The WTO Dispute Settlement System is considered the most important part of the WTO. Explain in detail the procedures that must be followed to bring an action before the WTO.

(b) Explain briefly how panelists are selected. Is there an appeal in the WTO Dispute System? Do you believe that a small developing country can win a dispute and enforce the decision against a developed country such as the U.S.?

Q. No. 4. (a) Enumerate in detail anti-dumping provisions under GATT and WTO. What are the methods laid down for determination of 'anti-dumping' and 'material injury'?

(b) Write briefly on Subsidies and Countervailing Measures Agreement under the WTO.

Q. No. 5. Discuss brieflyany *two* of the following:

(a) General Agreement on Trade in Services

(b) Background on Trade Related Investment Measures Agreement (TRIMS)

(c) Structure of WTO, 1995.

PART II

Q. No. 6. What do you understand by INCOTERMS? Briefly discuss the essential characteristics of CIF, FOB and FAS contracts. Explain the responsibilities of the parties under these contracts.

Q. No. 7. What is a Letter of Credit (LOC)? Discuss the features and rules which govern the operation of a letter of credit.

Q. No. 8. Write short notes on any *two* of the following:

(a) Bill of Lading

(b) Law relating to Bills of Exchange

(c) Types of International Contracts

LL.B. V Term Examination, 2016

Paper L.B. 5036 - International TradeLaw

Time:3hours   Maximum Marks:100

Note: *Attempt at least one question from each part and five questions in all.*

PART I

Q. No. 1. (a) What is the scope and function of WTO? Discuss in brief the organizational structure of the WTO.

(b) The Uruguay Round of Negotiations finally led to the creation of WTO‖. In the light of this statement briefly discuss the salient achievements of Uruguay Round.

Q. No. 2. (a) Explain the rules and exceptions governing Principle of National Treatment in WTO? Refer to relevant decisions of WTO.

(b) Country X takes a measure whereby meat imported from country Y is required to be sold from an exclusive separate outlet in the domestic market of X. Country Y alleges discrimination. Examine the validity of the measure taken by X and claims made by Y in the light of relevant finding made by WTO in the *Korea-Beef case*, WT/DS 161 (2000)

Q. No. 3. What are the objectives of Dispute Settlement Body of the WTO? Discuss in detail the different stages of the WTO Dispute Settlement Process.

Q. No. 4. What are the elements for identification of 'subsidy' under the GATT/WTO? Explain the various types of subsidy. What are the requirements before the countervailing measure can be applied under the framework of WTO?

Q. No. 5. Write short note on any two of the following:

a) India-Solar Panel Dispute

b) Anti-Dumping and Countervailing Duties

c) 'Services' under WTO.

PART II

Q. No. 6. Explain the standard trade terms CIF, FOB and FAS, commonly used in the international contracts of sale. What are the obligations of seller and buyer under these contracts?

Q. No. 7. What is a Letter of Credit (LOC) used in international commerce? Discuss the advantages and disadvantages of using the Letter of Credit?

Q. No. 8. Explain the purpose and functions of a Bill of Lading in International Commerce? Enumerate the liabilities of a carrier under the Bill of Lading.

LL.B. V Term Examination, 2015

Paper L.B. 5036 - International TradeLaw

Time:3hours Maximum Marks:100

Note: *Attempt at least one question from each part and five questions in all.*

PART I

Q. No. 1. (a) Discuss the objectives and functions of WTO.

(b) Describe the important differences between GATT and the WTO? How the current decision-making process under WTO is different from the GATT, 1947.

Q. No. 2. Discuss the rule governing —'Most Favoured Nation Treatment'(MFN) under the GATT, 1994. What are its exceptions? Support your answer with the help of WTO decisions.

Q. No. 3. What is dumping of goods? Discuss the scope and application of Article VI of GATT, 1994. Explain the process governing anti-dumping measures under the WTO.

Q. No. 4. The WTO dispute settlement system is considered the most important part of the WTO. Explain in detail the process of dispute settlement at WTO. What are the consequences of non-adherence to WTO findings?

Q. No. 5. Write short note on any two of the following:

a) Subsidies and CountervailingMeasures

b) Principle of NationalTreatment.

c) WTO DohaRound

PART II

Q. No. 6. What is a Bill of Lading? Explain its various types. Describe its different functions and purposes under the international carriage of goods.

Q. No. 7. What do you mean by International Commercial Terms used in international sale contracts? Discuss the obligations of the parties under CIF, FOB and FAScontracts.

Q. No. 8. (a) What is Letter of Credit in International Sales? Discuss its various types.

(b) Discuss the benefits of arbitration in the settlement of international commercial disputes.

LL.B. V Term Examination, 2014

Paper LB 5036 - International Trade Law

Time: 3 hours **Maximum Marks: 100**

PART I

1. Discuss briefly the developments leading to the establishment of WTO, 1995. Discuss also the differences between WTO, 1995 and GATT,1947.

2. General Most Favoured Nation Treatment is the cornerstone of the free trade, yet maintaining state freedom in regulating internationaltrade‖.

In the light of the above statement, discuss the salient features of MFN treatment. Discuss also exceptions, if any, to MFN treatment.

3. Discuss briefly any two of thefollowing;

(a) National Treatment

(b) General Agreement on Trade in Services

(c) Accession to WTO

4. The Understanding on Rules and Procedures governing the Settlement of Trade Disputes between nations has proved to be a boon to freedom of International Trade.

In the light of the above, discuss briefly the salient features of settlement of disputes under WTO, 1995. What will be the legal position if there is a conflict between the Dispute Settlement Agreement of WTO and Dispute Settlement Provisions of individual agreements, which are part of WTO, 1995.

5. Discuss briefly any two of thefollowing:

(a) Dumping and Anti-DumpingDuties

(b) Structure of WTO,1995

(c) Schedule ofConcessions

PART II

6. Discuss the main elements of a C.I.F. and F.O.B. contract. Discuss also the responsibilities of parties to a C.I.F. contract.

7. Discuss the salient features of a Letter of Credit. Discuss the Rules governing the operation of a Letter of Credit.

8. Discuss briefly any two of thefollowing:

(a) Commercial Arbitration

(b) Rejection of Documents and Rejection of Goods

(c) Bill of Lading

GENERAL AGREEMENT ON TARIFFS AND TRADE, 1994
(Revised and Amended GATT, 1947)
TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

PREAMBLE

PART I
Article I General Most-Favoured-Nation Treatment
Article II Schedules of Concessions

PART II
Article III National Treatment on Internal Taxation and Regulation
Article IV Special Provisions relating to Cinematograph Films
Article V Freedom of Transit
Article VI Anti-dumping and Countervailing Duties
Article VII Valuation for Customs Purposes
Article VIII Fees and Formalities connected with Importation and Exportation
Article IX Marks of Origin
Article X Publication and Administration of Trade Regulations
Article XI General Elimination of Quantitative Restrictions
Article XII Restrictions to Safeguard the Balance of Payments
Article XIII Non-discriminatory Administration of Quantitative restrictions
Article XIV Exceptions to the rule of Non-discrimination
Article XV Exchange Arrangements
Article XVI Subsidies
Article XVII State Trading Enterprises
Article XVIII Governmental Assistance to Economic Development
Article XIX Emergency Action on Imports of Particular Products
Article XX General Exceptions
Article XXI Security Exceptions
Article XXII Consultation
Article XXIII Nullification of Impairment

PART III
Article XXIV Territorial Application _ Frontier Traffic _ Customs Unions and Free-trade Areas
Article XXV Joint Action by the Contracting Parties
Article XXVI Acceptance, Entry into Force and Registration
Article XXVII Withholding or Withdrawal of Concessions
Article XXVIII Modification of Schedules
Article XXVIII bis Tariff Negotiations
Article XXIX The Relation of this Agreement to the Havana Charter
Article XXX Amendments
Article XXXI Withdrawal
Article XXXII Contracting Parties
Article XXXIII Accession
Article XXXIV Annexes
Article XXXV Non-application of the Agreement between Particular Contracting Parties

PART IV TRADE AND DEVELOPMENT
Article XXXVI Principles and Objectives
Article XXXVII. Commitments
Article XXXVIII Joint Action
Annexes A *to G* Relating to Article 1
Annex H Relating to Article XXVI
Annex I Notes and Supplementary Provisions

ARTICLES I AND II

Article I

General Most-Favoured-Nation Treatment

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*

The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

Preferences in force exclusively between the United States of America and the Republic of Cuba;

Preferences in force exclusively between neighboring countries listed in Annexes E and F.

The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, l923, provided such preferences are approved under paragraph 5t of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

The authentic text erroneously reads "sub-paragraph 5(a)".

ARTICLE II

The margin of preference on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:*

in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, l947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10,1947;

in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most favoured-nation and preferential rates existing on April 10,1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraph (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

Article II

Schedules of Concessions

(a) Each contracting party shall accord to the commerce of the

Other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;*

*any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;**

fees or other charges commensurate with the cost of services rendered.

No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

ARTICLE II

*If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.**

If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

(a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; provided that the CONTRACTING PARTIES (i.e., the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

PART II

*Article III**

National Treatment on Internal Taxation and Regulation

*The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domesticproduction.**

*The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph1.**

With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, l947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of thetax.

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economicoperationofthemeansoftransportandnotonthenationalityoftheproduct.

*No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1**

The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party onJuly1,1939,April10,1947,orMarch24,l948,attheoptionofthat contracting party; Provided that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

(a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Article IV

Special Provisions relating to Cinematograph Films

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;

With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;

Notwithstanding the provisions of sub-paragraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of sub-paragraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; Provided that no such minimum proportion of screen time shall be increased above the level in effect on April 10,1947;

Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

Article V

Freedom of Transit

Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".

There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

*With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.**

Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going throughtheterritoryofsuchothercontractingparty.Anycontractingpartyshall,however,befreetomaintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

Article VI

Anti-dumping and Countervailing Duties

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

in the absence of such domestic price, is less than either

the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

*Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.**

*In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph1.**

*No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise. **

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to antidumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

(a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in theterritoryofanothercontractingpartyexportingtheproductconcernedtotheterritoryofthe

*importing contracting party.**

In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; Provided that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Article VII

Valuation for Customs Purposes

The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.*

*(a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.**

*"Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation andimportation.**

*When the actual value is not ascertainable in accordance with sub-paragraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of suchvalue.**

The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin

or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

(a) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognized by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.

Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.

The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the CONTRACTING PARTIES, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.

Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.

The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

Article VIII

*Fees and Formalities connected with Importation and Exportation**

(a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph(a).

*The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements. **

A contracting party shall, upon request by another contracting party or by the CONTRACTING *PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.*

No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

consular transactions, such as consular invoices and certificates;

quantitative restrictions;

licensing;

exchange control;

statistical services;

documents, documentation and certification;

analysis and inspection; and

quarantine, sanitation and fumigation.

Article IX

Marks of Origin

Each contracting party shall accord to the products of the territories of other contracting parties' treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.

The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.

The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

Article X

Publication and Administration of Trade Regulations

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.

*Article XI**

General Elimination of Quantitative Restrictions

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on theexportationorsaleforexportofanyproductdestinedfortheterritory of any other contracting party.

The provisions of paragraph 1 of this Article shall not extend to the following:

Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain

groups of domestic consumers free of charge or at prices below the current market level; or

to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph

of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.*

*Article XII**

Restrictions to Safeguard the Balance of Payments

Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

(a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or

in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(b) Contracting parties applying restrictions under subparagraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

(a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

Contracting parties applying restrictions under this Article undertake:

*to avoid unnecessary damage to the commercial or economic interests of any other contracting party;**

not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and

not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

(a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

On a date to be determined by them, the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a prima facie case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in thecircumstances.

*In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying the restrictions.**

f) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balance of payments of which are under pressure or by those the balance of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

*Article XIII**

Non-discriminatory Administration of Quantitative Restrictions

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countriesortheexportationofthelikeproducttoallthirdcountriesissimilarlyprohibitedorrestricted.

In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;

In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;

Contracting parties shall not, except for purposes of operating quotas allocated in accordance with sub- paragraph (d) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;

*In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.**

(a) In cases in which import licences are issued in connection

with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; Provided that there shall be no obligation to supply information as to the names of importing or supplying enterprises.

In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry; Provided that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and Provided further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph.

In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

With regard to restrictions applied in accordance with paragraph 2 (d) of this Article or under paragraph 2 (c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the contracting party applying the restriction; Provided that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.*

The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

*Article XIV**

Exceptions to the Rule of Non-discrimination

*A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of ArticleXV.**

*A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contractingparties.**

The provisions of Article XIII shall not preclude a group of territories having a common quota in the International Monetary Fund from applying against imports from other countries, but not among themselves, restrictions in accordance with the provisions of Article XII or of Section B of Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.

A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Articles XI to XV or Section B of Article XVIII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

A contracting party shall not be precluded by Articles XI to XV, inclusive, or by Section B of Article XVIII, of this Agreement from applying quantitative restrictions:

having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article VII of the Articles of Agreement of the International Monetary Fund, or

under the preferential arrangements provided for in Annex A of this Agreement, pending the outcome of the negotiations referred to therein.

*Article XVI**

Subsidies

Section A _ Subsidies in General

If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

*Section B _ Additional Provisions on Export Subsidies**

The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

*Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in theproduct.**

Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing subsidies.

The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

Article XVII

State Trading Enterprises

(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.*

The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.*

No contracting party shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.

The provisions of paragraph 1 of this Article shall not apply to imports of products for immediateorultimateconsumptioningovernmentaluseandnototherwiseforresaleoruseinthe

production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.*

The contracting parties recognize that enterprises of the kind described in paragraph 1 (a) of this Article might be operated so as to create serious obstacles to trade; thus, negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.

(a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this Article.

A contracting party establishing, maintaining or authorizing an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product.*

The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interest under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (a), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

*Article XVIII**

Governmental Assistance to Economic Development

The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.**

The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.*

The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.*

(a) Consequently, a contracting party, the economy of which can only support low standards of living and is in the early stages of development, shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.*

(b) A contracting party, the economy of which is in the process of development, but which does not come within the scope of subparagraph (a) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

The contracting parties recognize that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4 (a) and (b) above and which depend on exports of a small number of primary commodities, may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.

The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

(a) If a contracting party coming within the scope of paragraph

4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.*

*(b) If agreement is not reached within sixty days after the notification provided for in sub- paragraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in sub- paragraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken th eaction.**

Section B

The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

Article XIX

Emergency Action on Imports of Particular Products

(a)If,asaresultofunforeseendevelopmentsandoftheeffectoftheobligationsincurredbyacontracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy suchinjury.

Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

(a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

necessary to protect public morals;

necessary to protect human, animal or plant life or health;

relating to the importations or exportations of gold or silver;

necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

relating to the products of prison labour;

f) imposed for the protection of national treasures of artistic, historic or archaeological value;

relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June1960.

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

relating to fissionable materials or the materials from which they are derived;

relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

taken in time of war or other emergency in international relations; or

to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article XXII

Consultation

Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contractingpartyorpartiesinrespectofanymatterforwhichithasnotbeenpossibletofindasatisfactory solution through consultation under paragraph 1.

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

the failure of another contracting party to carry out its obligations under this Agreement, or

the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shah give sympathetic consideration to the representations or proposals made to it.

If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary[1] to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

PART III

Article XXIV

Territorial Application _ Frontier Traffic _ Customs Unions and Free-trade Areas

The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; Provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

The provisions of this Agreement shall not be construed to prevent:

Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free- trade area; Provided that:

with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case maybe;

with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each if the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

If, in fulfilling the requirements of sub-paragraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

(a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

For the purposes of this Agreement:

A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected. This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8(b).*

The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

*Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitivebasis.**

Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

Article XXVI

Acceptance, Entry into Force and Registration

The date of this Agreement shall be 30 October1947.

This Agreement shall be open for acceptance by any contracting party

which, on 1 March 1955, was a contracting party or was negotiating with a view to accession to this Agreement.

This Agreement, done in a single English original and a single French original, both texts authentic, shall be deposited with the Secretary- General of the United Nations, who shall furnish certified copies thereof to all interested governments.

Each government accepting this Agreement shall deposit an instrument of acceptance with the Executive Secretary[1] to the CONTRACTING PARTIES, who will inform all interested governments of the date of deposit of each instrument of acceptance and of the day on which this Agreement enters into force under paragraph 6 of this Article.

(a) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary to the CONTRACTING PARTIES at the time of its own acceptance.

Any government, which has so notified the Executive Secretary1 under the exceptions in sub-paragraph (a) of this paragraph, may at any time give notice to the Executive Secretary1 that its acceptance shall be effective in respect of any separate customs territory or territories so excepted and such notice shall take effect on the thirtieth day following the day on which it is received by the Executive Secretary!

If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

This Agreement shall enter into force, as among the governments which have accepted it, on the

thirtieth day following the day on which instruments of acceptance have been deposited with Executive Secretary[1] to the CONTRACTING PARTIES on behalf of governments named in Annex H, the territories of which account for 85 per centum of the total external trade of the territories of such governments, computed in accordance with the applicable column of percentages set forth therein, The instrument of acceptance of each other government shall take effect on the thirtieth day following the day on which such instrument has been deposited.

The United Nations is authorized to effect registration of this Agreement as soon as it enters into force.

Article XXVII

Withholding or Withdrawal of Concessions

Any contracting party shall at any time be free to withhold or to withdraw in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was initially negotiated with a government which has not become, or has ceased to be, a contracting party. A contracting party taking such action shall notify the CONTRACTING PARTIES and, upon request, consult with contracting parties which have a substantial interest in the product concerned.

*Article XXVIII**

Modification of Schedules

On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest* (which two preceding categories of contracting parties, together with the applicant*

contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession, modify or withdraw a concession* included in the appropriate schedule annexed to this Agreement.*

In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavor to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations.

(a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

The CONTRACTING PARTIES may, at any time, in special circumstances, authorize a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to the following procedures and conditions:*

Such negotiations and any related consultations shall be conducted in accordance with the provisions of paragraph 1 and 2 of this Article.*

If agreement between the contracting parties primarily concerned is reached in the negotiations, the provisions of paragraph 3 (b) of this Article shall apply.

If agreement between the contracting parties primarily concerned

is not reached within a period of sixty days after negotiations have been authorized, or within such longer period as the CONTRACTING PARTIES may have prescribed, the applicant contracting party may refer the matter to the CONTRACTINGPARTIES.*

Upon such reference, the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement. If a settlement is reached, the provisions of paragraph 3 (b) shall apply as if agreement between the contracting parties primarily concerned had been reached. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the CONTRACTING PARTIES determine that the applicant contracting party has unreasonably failed to offer adequate compensation. If such action is taken, any contracting party withwhichtheconcessionwasinitiallynegotiated,anycontractingpartydeterminedunderparagraph4*

to have a principal supplying interest and any contracting party determined under paragraph 4 (a) to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with applicant contracting party.

Before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate schedule in accordance with the procedures of paragraph 1 to 3. If a contracting party so elects, other contracting parties shall have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.

Article XXVIII bis

Tariff Negotiations

The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time totime.

(a) Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.

The contracting parties recognize that in general the success of multilateral negotiations

would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another.

Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:

the needs of individual contracting parties and individual industries;

the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and

all other relevant circumstances, including the fiscal, developmental, strategic and other needs of the contracting parties concerned.

Article XXIX

The Relation of this Agreement to the Havana Charter

*The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.**

Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.

If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.

If at any time the Havana Charter should cease to be in force, the CONTRACTING PARTIES shall meet as soon as practicable thereafter to agree whether this Agreement shall be supplemented, amended or maintained. Pending such agreement, Part II of this Agreement shall again enter into force; Provided that the provisions of Part II other than Article XXIII shall be replaced, mutatis mutandis, in the form in which they then appeared in the Havana Charter; and Provided further that no contracting party shall be bound by any provisions which did not bind it at the time when the Havana Charter ceased to be in force.

If any contracting party has not accepted the Havana Charter by the date upon which it enters into force, the CONTRACTING PARTIES shall confer to agree whether, and if so in what way, this Agreement in so far as it affects relations between such contracting party and other contracting parties, shall be supplemented or amended. Pending such agreement the provisions of Part II of this Agreement shall, notwithstanding the provisions of paragraph 2 of this Article, continue to apply as between such contracting party and other contracting parties.

Contracting parties which are Members of the International Trade Organization shall not invoke the provisions of this Agreement so as to prevent the operation of any provision of the Havana Charter. The application of the principle underlying this paragraph to any contracting party which is not a Member of the International Trade Organization shall be the subject of an agreement pursuant to paragraph 5 of this Article.

PART IV

TRADE AND DEVELOPMENT

Article XXXVI

Principles and Objectives

** The Contracting Parties,*

recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less- developed contracting parties;

considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less- developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;

noting, that there is a wide gap between standards of living in less-developed countries and in other countries;

recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;

recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures _ and measures in conformity with such rules and procedures _ as are consistent with the objectives set forth in thisArticle;

f) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows.

There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties. There is need for positive efforts designed to ensure that less- developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.*

The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.*

Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

*The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.**

The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

Article XXXVII

Commitments

The developed contracting parties shall to the fullest extent possible _ that is, except when compelling reasons, which may include legal reasons, make it impossible _ give effect to the following provisions:

*accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;**

refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties;and

(i) refrain from imposing new fiscal measures, and

in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures,

which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

(a) Whenever it is considered that effect is not being given to any of the provisions of sub- paragraph (a), (b) or (c) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.

(b) (i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of sub-paragraph (a), (b) or (c) of paragraph 1 shall be examined.

As the implementation of the provisions of subparagraph (a), (b) or (c) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.

The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV.

The developed contracting parties hall:

make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels;

give active consideration to the adoption of other measures designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;*

have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

Less-developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties, in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less-developed contracting parties as a whole.

In the implementation of the commitments set forth in paragraph 1 to 4 each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise.

Article XXXVIII

Joint Action

The contracting parties shall collaborate jointly, with the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI.

In particular, the CONTRACTING PARTIES shall:

where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;

seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development;

collaborate in analysing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connection, seek appropriate collaboration with governments and international organizations, and in particular with organizations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less-developed contracting parties aimed at obtaining a clear analysis of export potential, market prospects and any further action that may be required;

keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less- developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate;

collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

[WTO officially commenced on 1 January 1995 under the Marrakesh Agreement, signed by 123 nations on 15 April 1994, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948]

The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

Article I

Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

Article II: Scope of the WTO

The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT1947").

Article III: Functions of the WTO

The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Article IV: Structure of the WTO

There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph7.

The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

The bodies provided for under the Plurilateral Trade Agreements shall carry out the functionsassignedtothemunderthoseAgreementsandshalloperatewithintheinstitutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

Article V: Relations with Other Organizations

The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Article VI: The Secretariat

There shall be a Secretariat of the WTO (hereinafter referred to as "the Secretariat")

headed by a Director-General.

The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

Article VII: Budget and Contributions

The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

the scale of contributions apportioning the expenses of the WTO among its Members ;and

the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.

Article VIII : Status of the WTO

The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

The WTO may conclude a headquarters agreement.

Article IX: Decision-Making

The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.[1] Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States[2] which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.[3]

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in ArticleX.

In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths[4] of the Members unless otherwise provided for in this paragraph.

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1 The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

2 The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

3 Decisions by the General Council when convened as the Dispute

Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision- making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths[5] of the Members.

A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

Article X Amendments

Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three- fourths majority of the Members that the provisions of paragraph 4 shall apply.

Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

Article IX of this Agreement; Articles I and II of GATT 1994; Article II:1 of GATS;

Article 4 of the Agreement on TRIPS.

Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex4.

Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XI Original Membership

The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Article XVI Miscellaneous Provisions

Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.

In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety- four, in a single copy, in the English, French and Spanish languages, each text being authentic.

Explanatory Notes:

The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

LIST OF ANNEXES

ANNEX 1

ANNEX 1A: Multilateral Agreements on Trade in Goods General Agreement on Tariffs and Trade 1994

Agreement on Agriculture

Agreement on the Application of Sanitary and Phytosanitary Measures Agreement on Textiles and Clothing

Agreement on Technical Barriers to Trade Agreement on Trade-Related Investment Measures

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

Agreement on Preshipment Inspection Agreement on Rules of Origin

Agreement on Import Licensing Procedures Agreement on Subsidies and Countervailing Measures Agreement on Safeguards

ANNEX 1B: General Agreement on Trade in Services and Annexes

ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

ANNEX2: Understanding on Rules and Procedures Governing the Settlement of Disputes

ANNEX3: Trade Policy Review Mechanism

ANNEX 4: Plurilateral Trade Agreements

Agreement on Trade in Civil Aircraft Agreement on Government Procurement International Dairy Agreement International Bovine Meat Agreement

ANNEX 2

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Members hereby agree as follows:

Article 1: Coverage and Application

The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2: Administration

The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.[6]

Article 3: General Provisions

Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public

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[6] The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.[7]

Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4: Consultations

Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning

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[7] *This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.*

measures affecting the operation of any covered agreement taken within the territory of the former.[8]

If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

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8 Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

During consultations Members should give special attention to the particular problems and interests of developing country Members.

Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[9]*, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.*

Article 5: Good Offices, Conciliation and Mediation

Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

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9 The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

The Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Article 6: Establishment of Panels

If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.[10]

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Article 7: Terms of Reference of Panels

Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name

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[10] *If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.*

of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

Article 8: Composition of Panels

Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

Citizens of Members whose governments[11] are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non- governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international

11 In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

Members shall undertake, as a general rule, to permit their officials to serve as panelists.

Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Article 9: Procedures for Multiple Complainants

Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

Article 10: Third Parties

The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Article 11: Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 12: Panel Procedures

Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

Article 13: Right to Seek Information

Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix4.

Article 14: Confidentiality

Panel deliberations shall be confidential.

The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

Opinions expressed in the panel report by individual panelists shall be anonymous.

Article 15: Interim Review Stage

Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments inwriting.

Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to

circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article12.

Article 16: Adoption of Panel Reports

In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[12] *unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.*

Article 17 Appellate Review

Standing Appellate Body

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12 *If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.*

A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90days.

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[13] *This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.*

Article 18

Communications with the Panel or Appellate Body

There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19

Panel and Appellate Body Recommendations

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[14] *bring the measure into conformity with that agreement.*[15] *In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.*

In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

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[13] *If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.*

Article 20

Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21

Surveillance of Implementation of Recommendations and Rulings

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

At a DSB meeting held within 30 days[16] *after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:*

the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[17] *In such arbitration, a guideline for the arbitrator*[18] *should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.*

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[14] *The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.*

[15] *With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.*

Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18months.

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the

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[16] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[17] If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

[18] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22

Compensation and the Suspension of Concessions

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

in applying the above principles, that party shall take into account:

the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

for purposes of this paragraph, "sector" means:

with respect to goods, all goods;

with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies suchsectors;[19]

with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

for purposes of this paragraph, "agreement" means:

with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

with respect to services, the GATS;

with respect to intellectual property rights, the Agreement on TRIPS.

The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[20] *appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.*

The arbitrator[21] *acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such*

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19 *The list in document MTN.GNS/W/120 identifies eleven sectors.*

20 *The expression "arbitrator" shall be interpreted as referring either to an individual or a group.*

21 *The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.*

suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[22]

Article 23

Strengthening of the Multilateral System

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

In such cases, Members shall:

not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

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22 *Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.*

follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 24

Special Procedures Involving Least-Developed Country Members

At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25 Arbitration

Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

Article 26

Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT1994

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT1994

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

GENERAL AGREEMENT ON TRADE IN SERVICES

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Annex on Negotiations on Basic Telecommunications

GENERAL AGREEMENT ON TRADE IN SERVICES

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby agree as follows:

PART I

SCOPE AND DEFINITION

Article I

Scope and Definition

This Agreement applies to measures by Members affecting trade in services.

For the purposes of this Agreement, trade in services is defined as the supply of a service:

from the territory of one Member into the territory of any other Member;

in the territory of one Member to the service consumer of any other Member;

by a service supplier of one Member, through commercial presence in the territory of any other Member;

by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

For the purposes of this Agreement:

"measures by Members" means measures taken by:

central, regional or local governments and authorities ;and

non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

"services" includes any service in any sector except services supplied in the exercise of governmental authority;

"a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

PART II

GENERAL OBLIGATIONS AND DISCIPLINES

Article II

Most-Favoured-Nation Treatment

With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Article III Transparency

Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit

within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

Article III bis

Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

Article IV

Increasing Participation of Developing Countries

The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia through access to technology on a commercial basis;

the improvement of their access to distribution channels and information networks; and

the liberalization of market access in sectors and modes of supply of export interest to them.

Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

commercial and technical aspects of the supply of services;

registration, recognition and obtaining of professional qualifications; and

the availability of services technology.

Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

Article V Economic Integration

This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

has substantial sectoral coverage[23]*, and*

provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a),through:

elimination of existing discriminatory measures, and/or

prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time- frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

(a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

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[23] *This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.*

If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of

Article XXI shall apply.

A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

(a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

Based on the reports of the working parties referred to in subparagraphs

(a) and (b), the Council may make recommendations to the parties as it deems appropriate.

A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

Article V bis

Labour Markets Integration Agreements

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration[24] of the labour markets between or among the parties to such an agreement, provided that such an agreement:

exempts citizens of parties to the agreement from requirements concerning residency and work permits;

is notified to the Council for Trade in Services.

Article VI Domestic Regulation

In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

(a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

based on objective and transparent criteria, such as competence and the ability to supply the service;

not more burdensome than necessary to ensure the quality of the service;

in the case of licensing procedures, not in themselves a restriction on the supply of the service.

(a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

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[24] *Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.*

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[25] *applied by that Member.*

In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

Article VII Recognition

For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

Each Member shall:

within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;

promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non- governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

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[25] *The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.*

Article VIII

Monopolies and Exclusive Service Suppliers

Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

Article IX: Business Practices

Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

Article X

Emergency Safeguard Measures

There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

European Communities — Regime for the Importation, Sale and Distribution of Bananas, WT/DS 27, 5 Feb., 1996

Key facts

Short title: *EC — Bananas III*

Complainant: *Ecuador; Guatemala; Honduras; Mexico; United States*

Respondent: *European Communities*

Third Parties: *Belize; Cameroon; Canada; Colombia; Costa Rica;*

Dominica; Dominican Republic; Ghana; Grenada; India; Jamaica; Japan; Mauritius; Nicaragua; Panama; Philippines; Saint Lucia; Saint Vincent and the Grenadines; Senegal; Suriname; Venezuela, Bolivarian Republic of; Côte d'Ivoire; Brazil; Madagascar

Agreements cited:	*Agriculture: Art. 19*
(as cited in request for consultations)	*Services (GATS): Art. II, IV, XVI, XVII GATT 1994: Art. I, II, III, X, XI, XIII*
	Import Licensing: Art. 1, 3
Request for Consultation s received:	*Trade-Related Investment Measures (TRIMs): Art. 2, 5*
	5 February 1996
Panel Report circulated:	
	22 May 1997
Appellate BodyReportcirculated:	
	9 September 1997
Article 21.3(c)ArbitrationReportcirculated:	*7 January 1998*
	12 April1999
Article 21.5 PanelReport(Ecuador) circulated:	
	12 April1999
Article 21.5 PanelReport(European Communities) circulated:	
	9 April 1999
Recourse to Article 22.6ArbitrationReportcirculated:	
	2 July 2001
Mutually AgreedSolutionnotified:	*7 April 2008*
Second Recourse toArticle 21.5 Panel	
Report(Ecuador) circulated:	

Article 21.5 PanelReport(United States) circulated:	*19 May 2008*
Second Recourse to Article 21.5 AppellateBody	*26 November 2008*
Report(Ecuador) circulated:	
Article 21.5 Appellate BodyReport(United States) circulated:	*26 November 2008*

Consultations

Complaints by Ecuador, Guatemala, Honduras, Mexico and the United States.

The complainants in this case other than Ecuador had requested consultations with the European Communities on the same issue on 28 September 1995 (DS16). After Ecuador's accession to the WTO, the current complainants again requested consultations with the European Communities on 5 February 1996. The complainants alleged that the European Communities' regime for importation, sale and distribution of bananas is inconsistent with Articles I, II, III, X, XI and XIII of the GATT 1994 as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and theGATS.

On 11 April 1996, the five complainants requested the establishment of a panel. At its meeting on 24 April 1996, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

Further to a second request by the five complainants, a panel was established at the DSB meeting on 8 May 1996. On 29 May 1996, the five complainants requested the Director-General to determine the composition of the Panel. On 7 June 1996, the panel was composed. The panel report was circulated to Members on 22 May 1997. The panel found that the European Communities' banana import regime and the licensing procedures for the importation of bananas in this regime are inconsistent with the GATT 1994. The panel further found that the Lomé waiver waives the inconsistency with Article XIII of the GATT 1994, but found no inconsistencies arising from the licensing system.

On 11 June 1997, the European Communities notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The Appellate Body report was circulated to Members on 9 September 1997. The Appellate Body mostly upheld the panel's findings, but reversed the panel's findings that the inconsistency with Article XIII of the GATT 1994 is waived by the Lomé waiver, and that certain aspects of the licensing regime violated Article X of GATT 1994 and the Import Licensing Agreement.

At its meeting on 25 September 1997, the Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted by the DSB.

Reasonable period of time

On 17 November 1997, the complainants requested that the reasonable period of time (RPT) for implementation of the recommendations and rulings of the DSB be determined by binding arbitration, pursuant to Article 21.3(c) of the DSU. The Award of the Arbitrator was circulated to Members on 7 January 1998. The Arbitrator determined that the RPT for implementation to be 15 months and 1 week from the date of the adoption of the reports i.e. it expired on 1 January1999.

Compliance proceedings

On 18 August 1998, further to the European Communities' revision of their legislation and despite holding that Article 21.5 does not require parties to consult as a prior condition to resort to these proceedings the complainants requested, in the interest of avoiding any further delay, consultations with the European Communities for the resolution of the disagreement between them over the WTO-consistency of measures introduced by the European Communities in purported compliance with the recommendations and rulings of the Panel and Appellate Body The European Communities then adopted a second Regulation which it said completed the implementation of the recommendations and rulings regarding this dispute insofar as its new system would be fully applicable from 1 January 1999, date of the expiry of the RPT. On 13 November 1998, Ecuador requested the reactivation of consultations initiated by a letter sent jointly with the other co-complainants on 18 August 1998 and held on 17 September 1998. On 18 November 1998, the European Communities confirmed their willingness to reactivate the consultations with a view to concluding the discussion of the subjects that were not discussed during the September consultations. Consultations between Ecuador and the European Communities took place on 23 November 1998 with the presence of Mexico who joined as a co-complainant in the same meeting.

On 15 December 1998 the European Communities requested the establishment of a panel under Article 21.5 (the EC compliance panel). The European Communities' request for a compliance panel was made in response to measures taken by the United States regarding the EC implementing measures, which the United States considered had failed to implement the WTO recommendations. More specifically, the European Communities requested the compliance panel to determine that the EC implementing measures must be presumed to conform to WTO rules unless challenged in accordance with DSU procedures. The complainants other than Ecuador objected in writing to the fact that the European Communities' request be considered as constituting recourse to Article 21.5 alleging that there was no procedural basis for treating a forthcoming meeting as the second DSB meeting at which the panel could be established and that the European Communities had not satisfied its own stipulated precondition for the lodging of such request insofar as it had not sought consultations on the matter.

On 18 December 1998, Ecuador requested the re-establishment of the original panel to examine whether the EC measures to implement the recommendations of the DSB were WTO-consistent. (Ecuador compliance panel).

At its meeting on 12 January 1999, the DSB agreed to reconvene the original panel, pursuant to Article 21.5 of the DSU, to examine both Ecuador's and the European Communities' compliance panel requests. Jamaica, Nicaragua, Colombia, Costa Rica, Côte d'Ivoire, Dominican Republic, Dominica, St. Lucia, Mauritius, St. Vincent, indicated their interest to join as third parties in both requests, while Ecuador and India indicated their third-party interest only in the European Communities' request. The four original complaining parties other than Ecuador (i.e. Guatemala, Honduras, Mexico and the United States) refrained from requesting a panel or from joining the procedure initiated by Ecuador.

On 14 January 1999, the United States requested pursuant to Article 22.2 of the DSU, the DSB's authorization to suspend concessions or other obligations (see below). On 8 November 1999, and prior to the adoption of the reports of the European Communities and Ecuador compliance panels, Ecuador also requested authorization from the DSB to suspend the application to the European Communities of concessions or other related obligations (see below). On 18 January 1999, the compliance panels were composed. The two compliance panel reports were circulated on 12 April 1999.

The EC compliance panel found that, because a challenge had actually been made by Ecuador regarding the WTO-consistency of the EC measures taken in implementation of the DSB recommendations, it was unable to agree with the European Communities that the European Communities must be presumed to be in compliance with the recommendations of the DSB. The report of the EC compliance panel was never adopted by the DSB.

The compliance panel requested by Ecuador found that the implementation measures taken by the European Communities in compliance with the recommendations of the DSB were not fully compatible with the European Communities' WTO obligations. The report of the Ecuador compliance panel was adopted by the DSB on 6 May 1999.

Proceedings under Article 22 of the DSU (remedies)

On 14 January 1999, the United States requested, pursuant to Article 22.2 of the DSU, the DSB's authorization to suspend of concessions or other obligations to the European Communities in an amount of USD520 million. The European Communities objected to the level of suspension proposed by the United States on the ground that it was not equivalent to the level of nullification or impairment of benefits suffered by the United States and claimed that the principles and procedures set out in Article 22.3 of the DSU had not been followed. Pursuant to Article 22.6 of the DSU, the European Communities requested that the original panel carry out the arbitration on the level of suspension of concessions requested by the United States. The DSB referred the issue of the level of suspension to the original panel for arbitration on 29 January 1999. The decision by the arbitrator was circulated on 9 April 1999. The Arbitrator found that the level of suspension sought by the United States was not equivalent to the level of nullification and impairment suffered as a result of the EC's new banana regime not being fully compatible with the WTO. The Arbitrator accordingly determined the level of nullification suffered by the United States to be equal to USD191.4 million per year and that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of USD191.4 million per year would be consistent with Article 22.4 of the DSU.

On 9 April 1999, the United States, pursuant to Article 22.7 of the DSU, requested that the DSB authorize suspension of concessions to the European Communities equivalent to the level of nullification and impairment, i.e. USD191.4 million. On 19 April 1999, the DSB authorized the United States to suspend concessions to the European Communities as requested. On 8 November 1999, and prior to the adoption of the compliance panel report by Ecuador (see above), Ecuador requested authorization from the DSB to suspend the application to the European Communities of concessions or other related obligations under the TRIPS Agreement, GATS and GATT 1994, pursuant to Article 22.2 of the DSU, in an amount of USD450 million. At the DSB meeting on 19 November 1999, the European Communities objected to the proposed level of suspension alleging it exceeded the level of nullification or impairment Ecuador had suffered and to Ecuador's request for cross-retaliation stating Ecuador has not followed the principles and procedures set forth in Article

22.3 of the DSU. The European Communities therefore requested, pursuant to Article 22.6 of the DSU, the matter be referred to arbitration.. At its meeting on 19 November 1999, the DSB referred the issue to the original panel for arbitration in accordance with Article 22.6 of the DSU. The Arbitrator's decision on the Ecuadorian request for suspension of concessions was circulated to Members on 24 March 2000. The Arbitrator found that the level of nullification and impairment suffered by Ecuador amounted to USD201.6 million per year. The Arbitrator found that Ecuador's request for retaliation did not follow the principles and procedures set forth in Article 22.3, especially regarding the suspension of concessions under the GATT 1994 with respect to goods destined for final consumption and that the level of suspension requested by Ecuador exceeded the level of nullification and impairment suffered by it as a result of the European Communities' failures to bring the EC banana import regime into compliance with WTO law within the RPT. Accordingly, the Arbitrator found that Ecuador may request authorization by the DSB to suspend concessions or other obligations under GATT 1994 (not including investment goods or primary goods used as inputs in manufacturing and processing industries); under GATS with respect to ―wholesale trade services‖ (CPC 622) in the principal distribution services; and, to the extent that suspension requested under GATT 1994 and GATS was insufficient to reach the level of nullification and impairment determined by the Arbitrator, under TRIPS in the following sectors of that Agreement: Section 1 (copyright and related rights); Article 14 on protection of performers, producers of phonograms and broadcasting organisations), Section 3 (geographical indications), Section 4 (industrial designs). The Arbitrator also noted that, pursuant to Article 22.3 of the DSU, Ecuador should first seek to suspend concessions or other obligations with respect to the same sectors as those in which the panel reconvened at the request of Ecuador pursuant to Article 21.5 of the DSU had found violations, i.e. GATT 1994 and the sectorofdistributionservicesunderGATS.On8May2000,Ecuadorrequested,pursuanttoArticle

of the DSU, that the DSB authorize the suspension of concessions to the EC equivalent to the level of nullification and impairment, i.e. US$201.6 million. On 18 May 2000, the DSB authorized Ecuador to suspend concessions to the European Communities as requested.

Compliance proceedings (second recourse)

On 30 November 2005, Honduras, Nicaragua and Panama requested consultations with the European Communities under Article 21.5 of the DSU concerning the measures adopted on 29 November 2005 by the European Communities to address the requirements provided for by the Waiver adopted in Doha Ministerial in November 2001 with regard to banana trade (―Doha Waiver‖) (see below). The measures at issue are relevant provisions of the recently passed EC Council Regulation governing the import regime for banana. The measures at issues were adopted following two Arbitrations under the Doha Waiver, both of which ruled against previous proposals by the European Communities to address the same matter. According to the requests, the EC Council Regulation is WTO-inconsistent in the following respects:

The 176€/mt MFN rate is inconsistent with the Doha Waiver in all its parts, the Arbitration Awards of 1 August and 27 October 2005, GATT Article XXVIII, and the Appellate Body report and the Panel report as modified by the Appellate Body Report in EC-Bananas III; and

The zero-duty ACP tariff quota of 775,000 mt and over-quota ACP tariff of 176€/mt are inconsistent with the Doha Waiver in all its parts, the Arbitration Awards of 1 August and 27 October 2005, GATT Articles I and XIII, and the Appellate Body report and the Panel report as modified by the Appellate Body Report in EC-Bananas III.

On 16 November 2006, Ecuador requested consultations under Article 21.5 of the DSU and Article XXIII of the GATT 1994 with respect to measures taken by the European Communities to comply with the recommendations and rulings contained in Council Regulation No. 1964/2005 (―Regulation1964‖)anditsassociatedimplementingregulationstakenintheframeworkofthetwo

—Understandings on Bananas‖ the European Communities reached in April 2001 with the United States and Ecuador (see below). On 28 November 2006, Ecuador submitted a revised request for consultations under Article 21.5 of the DSU and Article XXII of the GATT 1994. On 30 November 2006, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, St. Lucia, St. Vincent and the Grenadines, and Suriname requested to join the consultations. On 4 December 2006, Cameroon requested to join the consultations. On 6 December 2006, Jamaica requested to join the consultations. On 11 December 2006, Panama and the United States requested to join the consultations. The European Communities informed the DSB that they had accepted all the requests to join the consultations. On 23 February 2007, Ecuador requested the establishment of a compliance panel. At its meeting on 20 February 2007, the DSB deferred the establishment of a compliance panel. At its meeting on 20 March 2007, the DSB agreed to refer to the original panel, if possible, the question of whether the new EC banana regime was in conformity with the DSB's recommendations and rulings. Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Japan, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and the United States reserved their third-party rights. Subsequently, Belize, Brazil, Madagascar, Nicaragua, Panama and Suriname reserved their third-party rights.

On 5 June 2007, Ecuador requested the Director-General to determine the composition of the compliance panel. On 15 June 2007, the Director-General composed the compliance panel. On 5 December 2007, the Chairman of the compliance panel informed the DSB that it would not be possible to circulate its report within 90 days after the date of referral. The compliance panel expected to issue its final report to parties in December 2007 and, following translation, the final report was expected to be circulated to Members in February2008.

On 29 June 2007, the United States requested the establishment of a compliance panel as it considered that the European Communities had failed to bring its import regime for bananas into compliance with its WTO obligations and the regime remains inconsistent. At its meeting on 12 July 2007, the DSB referred the matter to the original panel, if possible. Brazil, Cameroon, Colombia, the Dominican Republic, Ecuador, Jamaica, Japan, Nicaragua and Panama reserved their third-party rights. Subsequently, Belize, Côte d'Ivoire, Dominica, Mexico, St. Lucia, St .Vincent and the Grenadines, and Suriname reserved their third-party rights.

On 3 August 2007, the United States requested the Director-General to determine the composition of the compliance panel. On 13 August 2007, the Director-General composed the compliance panel. On

21 February 2008, the Chairman of the compliance panel informed the DSB that it would not be possible to circulate its report within 90 days after the date of referral. The compliance panel expected to issue its final report to parties no later than the end of the first week of March2008.

On 7 April 2008, the compliance panel report requested by Ecuador was circulated to Members. The Panel rejected the preliminary issue raised by the European Communities that Ecuador is prevented from challenging the EC current import regime for bananas, including the preference for ACP countries, because of the Understanding on Bananas, signed by both Members in April 2001. Accordingly, and after having examined the substantive claims raised by Ecuador as well as the defences invoked by the European Communities, the compliance panel concluded that:

The preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members, and is therefore inconsistent with Article I:1 of GATT1994;

With the expiration of the Doha Waiver from 1 January 2006 as it applied to bananas, there is no evidence that, during the period that is relevant for this Panel's findings, that is, from the time of the establishment of the Panel until the date of this Report, any waiver from Article I:1 of GATT 1994 has been in force to cover the preference granted by the European Communitiestotheduty-freetariffquotaofimportedbananasoriginatinginACPcountries;

The EC current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Article XIII:1, with the chapeau of Article XIII:2, and with Article XIII:2(d) of the GATT 1994;

The tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, withoutconsiderationofthetariffquotafor2.2millionmtboundatanin-quotatariffrateof

€75/mt, is an ordinary customs duty in excess of that set forth and provided for in Part I of the EC Schedule. This tariff is therefore inconsistent with the first sentence of Article II:1(b) of the GATT 1994; and,

It is unnecessary, for the resolution of this dispute, to make a separate finding on Ecuador's claim under Article II:1(a) of the GATT1994.

In consequence, the compliance panel concluded that, through its current regime for the importation of bananas, established in Council Regulation (EC) No. 1964/2005 of 29 November 2005, including the duty-free tariff quota for bananas originating in ACP countries and the MFN tariff currently setat

€176/mt, the European Communities had failed to implement the recommendations and rulings of the DSB.

The compliance panel recommended that the DSB request the European Communities to bring the inconsistent measures into conformity with its obligations under the GATT 1994.

On 19 May 2008, the compliance panel report requested by the United States was circulated to Members. Regarding the preliminary objections advanced by the European Communities, the compliance panel found that:

the United States had, under the DSU, the right to request the initiation of the current compliance dispute settlement proceedings;

the European Communities has not succeeded in making a prima facie case that the United States is prevented from challenging the EC current import regime for bananas, including the preference for ACP countries, because of the Bananas Understanding, signed between the United States and the European Communities in April2001; and

the European Communities has failed in making a case that the United States' complaint under Article 21.5 of the DSU should be rejected, because the EC current import regime for bananas,includingthepreferenceforACPcountries,isnota—measuretakentocomply‖with the recommendations and rulings of the DSB in the original proceedings.

The compliance panel accordingly rejected the preliminary issues raised by the European Communities.

After having examined the substantive claims raised by the United States, as well as the defences invoked by the European Communities, the compliance panel concluded that:

The preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members, and is therefore inconsistent with Article I:1 of the GATT1994;

With the expiration of the Doha Waiver from 1 January 2006 as it applied to bananas, the European Communities has failed to demonstrate the existence of a waiver from Article I:1 of the GATT 1994 to cover the preference granted by the European Communities to the duty- free tariff quota of imported bananas originating in ACP countries; and

the EC current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is also inconsistent with Article XIII:1 and Article XIII:2 of the GATT1994;

In consequence, the compliance panel concluded that, through its current regime for the importation of bananas, established in Council Regulation (EC) No. 1964/2005 of 29 November 2005, in particular its duty-free tariff quota for bananas originating in ACP countries, the European Communities had failed to implement the recommendations and rulings of the DSB.

The compliance panel also concluded that, to the extent that the current EC bananas import regime contains measures inconsistent with various provisions of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that Agreement.

Since the original DSB recommendations and rulings in this dispute remain operative through the results of the current compliance proceedings, the compliance panel made no new recommendation.

Pursuant to a request from Ecuador and the European Communities, at its meeting on 2 June 2008, the DSB agreed to an extension of the time-period in Article 16.4 to enable them to explore the possibility of reaching a mutually agreed solution.

Pursuant to a request from the United States and the European Communities, at its meeting on 24 June 2008, the DSB agreed to an extension of the time-period in Article 16.4 to enable them to explore the possibility of reaching a mutually satisfactory solution.

On 28 August 2008, the European Communities notified its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the compliance panel relating to the compliance panels requested by Ecuador and the United States. On 9 September 2008, Ecuador notified its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the compliance panel.

On 21 October 2008, the Chairman of the Appellate Body notified the DSB that it would not be able to circulate its reports within 60 days due to the time required for completion and translation of the report. It was estimated that the reports would be circulated no later than 26 November2008.

On 26 November 2008, the Appellate Body reports were circulated to Members.

In the appeal of the compliance panel report requested by Ecuador, with respect to procedural issues, the Appellate Body found the compliance panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States; and upheld the compliance panel's finding, albeit for different reasons, that Ecuador was not barred by the Understanding on Bananas from initiating this compliance proceeding.

With respect to Article XIII of the GATT 1994, the Appellate Body upheld the compliance panel's findings that, to the extent that the European Communities argues that it has implemented a suggestion pursuant to Article 19.1 of the DSU, the compliance panel was not prevented from conducting, under Article 21.5 of the DSU, the assessment requested by Ecuador; and that, therefore, the compliance panel did not need to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador. The Appellate Body also upheld, albeit for different reasons, the compliance panel's finding that the EC Bananas Import Regime, in particular, its duty-free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT1994.

With respect to Article II of the GATT 1994, the Appellate Body reversed the compliance panel's finding that the Doha Article I Waiver constituted a subsequent agreement between the parties extending the tariff quota concession for bananas listed in the European Communities' Schedule of Concessions beyond 31 December 2002, until the rebinding of the EC tariff on bananas. The Appellate Body also reversed the compliance panel's finding that the E C' tariff quota concession for bananas was intended to expire on 31 December 2002 on account of paragraph 9 of the Bananas Framework Agreement.

The Appellate Body upheld, albeit for different reasons, the compliance panel's findings that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota of 2.2 million mt bound at an in-quota tariff rate of €75/mt, is an ordinary customs duty in excess of that provided for in the EC Schedule of Concessions, and thus inconsistent with Article II:1(b) of the GATT 1994 and that the European Communities, by maintaining measures inconsistent with different provisions of the GATT 1994, including Article XIII, had nullified or impaired benefits accruing to Ecuador under that Agreement.

The Appellate Body recommended that the DSB request the European Communities to bring its measure, found to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

In the appeal of the compliance panel report requested by the United States, with respect to procedural issues, the Appellate Body found that the compliance panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States, albeit for different reasons, upheld the compliance panel's findings that the United States was not barred by the Understanding on Bananas from initiating this compliance proceeding and that the EC Bananas Import Regime constituted a ―measure taken to comply‖ within the meaning of Article 21.5 of the DSU and was therefore properly before the compliance panel. The Appellate Body also found that the compliance panel did not err in making findings with respect to a measure that had ceased to exist subsequent to the establishment of the compliance panel, but before the compliance panel issued its report. The Appellate Body also found that the deficiencies in the European Communities' Notice of Appeal do not lead to dismissal of the European Communities' appeal.

With respect to Article XIII of the GATT 1994, the Appellate Body upheld, albeit for different reasons, the compliance panel's finding that the EC Bananas Import Regime, in particular, its duty- free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994 and the compliance panel's finding that to the extent that the EC Bananas Import Regime contained measures inconsistent with various provisions of the GATT 1994, it nullified or impaired benefits accruing to the United States under that Agreement.

As the measure at issue was no longer in existence, the Appellate Body did not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.

At its meeting on 11 December 2008, with respect to the compliance panel requested by Ecuador, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

At its meeting on 22 December 2008, with respect to the compliance panel requested by the United States, the DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report.

Implementation of adopted reports

At the DSB meeting on 19 November 1999 and following the first series of compliance panel proceedings (see above), the European Communities informed the DSB of its proposal for reform of the banana regime, which envisages a two-stage process, comprising a tariff rate quota system for several years. This system should then be replaced by a tariff only system no later than 1 January 2006. The proposal includes a decision to continue discussions with interested parties on the possible systems for distribution of licences for the tariff rate quota regime. If no feasible system can be found, the proposal for a transitional tariff rate quota regime would not be maintained and negotiations under Article XXVIII of GATT 1994 would be envisaged to replace the current system with a tariff only regime. At the DSB meeting on 24 February 2000, the EC explained that there continued to be divergent views expressed by the main parties concerned and that, as a result, no agreed conclusions could be reached.

At the DSB meeting of 27 July 2000 and following the Arbitrator's decision on the Ecuadorian request for suspension of concessions (see above), the European Communities stated with respect to implementation of the recommendations of the DSB that it had begun examining the possibility of managing the proposed tariff rate quotas on a first come, first served basis because negotiations with interested parties on tariff rate quota allocation on the basis of traditional trade flows had reached an impasse. The European Communities also said that its examination would include a tariff only system and its implications. At the DSB meeting of 23 October 2000, the European Communities stated that it was finalizing its internal decision-making process with a view to implementing the new banana regime. To this effect, the European Communities considered that, during a transitional period of time, its new banana regime should be regulated by the establishment of tariff-rate quotas and managed on the basis of a ―first-come, first-served‖ (FCFS) system. Before the end of transitional period of time, the European Communities would initiate Article XXVIII negotiations with a view to establishing a tariff-only system. On 1 March 2001, the European Communities reported to the DSB that on 29 January 2001, the Council of the European Union adopted Regulation (EC) No 216/2001 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas. The modifications made in Council Regulation 216/2001 provide for three tariff quotas open to all imports irrespective of their origin: (1) a first tariff quota of 2.200.000 tonnes at a rate of 75€/tonnes, bound under the WTO; (2) a second autonomous quota of 353.000 tonnes at a rate of 75€/tonnes; (3) a third autonomous quota of 850.000 tonnes at a rate of 300€/tonnes. Imports from ACP countries will enter duty-free. In view of contractual obligations towards these countries and the need to guarantee proper conditions of competition, they will benefit from a tariff preference limited to a maximum of 300€/tonnes. The tariff quotas are a transitional measure leading ultimately to a tariff-only regime. According to the European Communities, substantial progress has been achieved with respect to the implementing measures necessary to manage the three tariff rate quotas on the basis of the First-come, First-served method.

On 3 May 2001, the European Communities reported to the DSB that intensive discussions with the United States and Ecuador, as well as the other banana supplying countries, including the other co-complainants, have led to the common identification of the means by which the long-standing dispute over the EC's bananas import regime will be resolved. In accordance with Article 16(1) of Regulation No (EC) 404/93 (as amended by Council Regulation No (EC) 216/2001), the EC will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006. GATT Article XXVIII negotiations will be initiated in good time to that effect. In the interim period, starting on 1 July 2001, the European Communities will implement an import regime based on three tariff rate quotas, to be allocated on the basis of historical licensing.

On 22 June 2001, the European Communities notified an ―Understanding on Bananas between the European Communities and the United States‖ of 11 April 2001, and an ―Understanding on Bananas between the European Communities and Ecuador‖ of 30 April 2001. Pursuant to these

Understandings with the United States and Ecuador, the European Communities will implement an import regime on the basis of historical licensing as follows:

effective 1 July 2001, the European Communities will implement an import regime on the basis of historical licensing as set out in annex to each of the Understandings;

effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of an Article XIII waiver, the European Communities will implement an import regime on the basis of historical licensing as set out in annex to each of the Understandings.

The Commission will seek to obtain the implementation of such an import regime as soon as possible. Pursuant to its Understanding with the European Communities, the United States:

upon implementation of the new import regime described under (1) above, would provisionally suspendits imposition of the increased duties;

upon implementation of the new import regime described under (2) above, would terminate its imposition of the increased duties;

may reimpose the increased duties if the import regime described under (2) does not enter into force by 1January 2002; and

would lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described under (2) above until 31 December2005.

Pursuant to its Understanding with the European Communities, Ecuador:

took note that the European Commission will examine the trade in organic bananas and report accordingly by 31 December 2004;

upon implementation of the new import regime, Ecuador's right to suspend concessions or other obligations of a level not exceeding US$201.6 million per year vis-à-vis the EC would be terminated;

Ecuador would lift its reserve concerning the waiver of Article I of the GATT 1994 that the European Communities has requested for preferential access to the European Communities of goods originating in ACP states signatory to the Cotonou Agreement; and would actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December2005.

The European Communities notified the Understandings as mutually satisfactory solutions within the meaning of Article 3.6 of the DSU. Both Ecuador and the United States communicated that the Understandings did not constitute mutually satisfactory solutions within the meaning of Article 3.6 of the DSU and that it would be premature to take the item off the DSB agenda. At the DSB meeting on 25 September 2001, Ecuador made an oral statement whereby it criticised the Commission proposal aimed at reforming the EC common organization for bananas in order to honour the above Understandings.

On 4 October 2001, the European Communities circulated a status report on the implementation where it indicated that it was continuing to work actively on the legal instruments required for the management of the three tariff quotas after 1 January 2002. In addition, the European Communities' report indicated that no progress had been made since the previous DSB meeting regarding the waiver request submitted by the European Communities and the ACP States. The European Communities further indicated that in the event that no progress was made at the meeting of the Council of Trade in Goods scheduled for 5 October 2001, the European Communities and the ACP States would be forced to reassess the situation in all respects. At the DSB meeting on 15 October 2001, the European Communities recalled that the procedure for the examination of the waiver request had been unblocked at the meeting of the Council for Trade in Goods on 5 October 2001, and expressed its readiness to work and discuss with all interested parties in the course of this examination. Ecuador said that if the waiver was limited to what was required during the transitional import regime then it could be granted quickly. Guatemala said that it would carefully follow the outcome of the European Communities' actions and requested that the item should remain on the DSB agenda. Honduras noted that the European Communities had an obligation to describe the measures to be put in place after 2005. It also reiterated its concerns that the rights of developing countries were not being respected. Panama supported the statement by Honduras and urged the European Communities to take into account the concerns of Latin American banana exporters. The United States expressed satisfaction that the examination procedure of the waiver request had started and hoped that the process would be expeditious. St. Lucia said that the statement by Honduras that the European Communities disregarded the rights of some developing countries was inaccurate. It welcomed the start of the examination procedure and hoped that any current differences would soon be resolved. At the DSB meeting on 5 November 2001, the European Communities informed that the Working Party to examine the waiver requests submitted by the European Communities and ACP had made some progress. Ecuador said that tariff preferences to be applied by the European Communities would reproduce the same inconsistencies in the banana import regime. Honduras indicated that it was necessary to ensure that the scope of the waiver did not go beyond what was required for the implementation of the new regime. Panama said that even if the waiver was granted, the dispute would not be settled.

At the DSB meeting on 18 December 2001, the European Communities welcomed the granting of the two waivers by the Ministerial Conference, which were the prerequisite for the implementation of phase II of the Understandings reached with the United States and Ecuador. The European Communities noted that the Regulation implementing phase II would be adopted on 19 December 2001, with effect on 1 January 2002. Ecuador, Honduras, Panama and Colombia noted the progress made and sought information from the European Communities concerning the granting of import licences by one EC member State in a manner that was inconsistent with the Understandings. On 21 January 2002, the European Communities announced that Regulation (EC) No. 2587/2001 had been adopted by the Council on 19 December 2001 and indicated that through this Regulation the European Communities had implemented phase 2 of the Understandings with the United States and Ecuador. Pursuant to the Understandings on Bananas and the Doha Waiver, the European Communities adopted the 2005 Regulation which was challenged in the second series of compliance panel proceedings (see above). Following the Appellate Body reports in such compliance proceedings, the European Communities informed the DSB on 9 January 2009 that it intends to bring itself into compliance with its recommendations and rulings by modifying its scheduled tariff commitments on bananas through an agreement on the level of the new EC bound tariff duty with Latin American banana supplying countries pursuant to negotiations under Article XXVIII of the GATT.

At the DSB meeting on 21 December 2009, the European Union reported that it had reached a historic agreement with Latin American banana suppliers the previous week (the so-called ―Geneva Agreement on Trade in Bananas‖). The agreement, together with an agreement regarding the settlement of the case brought by the United States, had been initialled on 15 December 2009. Those agreements provided for final settlement of all current disputes regarding the EU import regime on bananas upon certification of a new EU tariff schedule on bananas. On 7 January 2010, the European Union and Ecuador notified the DSB that in light of the Geneva Agreement on Trade in Bananas, it

was not necessary for the European Union to continue to provide status reports in this dispute while the European Union is taking the necessary steps to implement the terms of the Agreement.

Mutually agreed solution

On 8 November 2012, the parties notified the DSB of a mutually agreed solution pursuant to Article 3.6 of the DSU.

Measures Affecting the Automotive Sector WT/DS146/R, 5 April, 2002

Key facts

Short title:	*India — Autos*
Complainant:	*European Communities*
Respondent:	*India*
Third Parties:	*Japan; Korea, Republic of*
Agreements cited:	*GATT 1994: Art. III, XI*
(as cited in request for consultations)	*Trade-Related Investment Measures (TRIMs): Art. 2*
Request for Consultations received:	*6 October 1998*
Panel Report circulated:	*21 December 2001*
Appellate Body Report circulated:	*19 March 2002*

Consultations

Complaint by the European Communities.

On 6 October 1998, the EC requested consultations with India concerning certain measures affecting the automotive sector being applied by India. The EC stated that the measures include the documents entitled ―Export and Import Policy, 1997-2002‖, ―ITC (HS Classification) Export and Import Policy 1997-2002‖ (―Classification‖), and ―Public Notice No. 60 (PN/97-02) of 12 December 1997, Export and Import Policy April 1997-March 2002‖, and any other legislative or administrative provision implemented or consolidated by these policies, as well as MoUs signed by the Indian Government with certain manufacturers of automobiles. The EC contended that:

under these measures, imports of complete automobiles and of certain parts and components were subject to a system of non-automatic import licenses.

in accordance with Public Notice No. 60, import licenses might be granted only to local joint venture manufacturers that had signed an MoU with the Indian Government, whereby they undertook, inter alia, to comply with certain local content and export balancing requirements.

The EC alleged violations of Articles III and XI of GATT 1994, and Article 2 of the TRIMs Agreement. On 1 May 1999, the United States requested consultations (WT/DS175) with India in respect of certain Indian measures affecting trade and investment in the motor vehicle sector. The United States contended that the measures in question required manufacturing firms in the motor vehicle sector to: achieve specified levels of local content;

achieve a neutralization of foreign exchange by balancing the value of certain imports with the value of exports of cars and components over a stated period; and

limit imports to a value based on the previous year's exports.

According to the United States, these measures were enforceable under Indian law and rulings, and manufacturing firms in the motor vehicle sector must comply with these requirements in order to obtain Indian import licenses for certain motor vehicle parts and components. The United States considered that these measures violate the obligations of India under Articles III and XI of GATT 1994, and Article 2 of the TRIMS Agreement.

On 15 May 2000, the US requested the establishment of a panel. At its meeting on 19 June 2000, the DSB deferred the establishment of a Panel.

Panel and Appellate Body proceedings

Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 27 July 2000. The EC, Japan and Korea reserved their third-party rights.

On 12 October 2000, the EC also requested the establishment of a panel. At its meeting on 23 October 2000, the DSB deferred the establishment of a Panel. Further to a second request by the EC, the DSB established a panel at its meeting of 17 November 2000. Since a panel had already been established with a similar mandate in the framework of the case WT/DS175, the DSB decided to join the panel with the already established panel in that case pursuant to Article 9.1 of the DSU. Japan reserved its third-party rights. On 14 November 2000, the US requested the Director-General to determine the composition of the Panel. On 24 November 2000, the Panel was composed.

On 21 December 2001, the Panel circulated its report to the Members. The Panel concluded that:

India had acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing on automotive manufacturers an obligation to use a certain proportion of local parts and components in the manufacture of cars and automotive vehicles (–indigenization‖ condition);

India had acted inconsistently with its obligations under Article XI of the GATT 1994 by imposing on automotive manufacturers an obligation to balance any importation of certain kitsandcomponentswithexportsofequivalentvalue(—tradebalancing‖condition);and,

India had acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing, in the context of the trade balancing condition, an obligation to offset the amount of any purchases of previously imported restricted kits and components on the Indian market, by exports of equivalent value.

The Panel recommended that the DSB requests India to bring its measures into conformity with its obligations under the WTO Agreements.

On 31 January 2002, India appealed the above Panel Report. In particular, India sought review of the following Panel's conclusion on the grounds that they are in error and based upon erroneous findings on issues of law and related legal instruments:

Articles 11 and 19.1 of the DSU required it to address the question of whether the measures found to be inconsistent with Articles III:4 and XI:1 of the GATT had been brought into conformity with the GATT as a result of measures taken by India during the course of the

proceedings, and the enforcement of the export obligations that automobile manufacturers incurred until 1 April 2001 under India's former import licensing scheme is inconsistent with Articles III: 4 and XI:1 of the GATT.

On 14 March 2002, India withdrew its appeal. Further to India's withdrawal of its appeal, the Appellate Body issued a short Report outlining the procedural history of the case. At the DSB meeting on 5 April 2002, the US commended India's decision to withdraw its appeal and shared some of India's reservations with regard to Section VIII of the Panel Report. The EC considered that the Panel's findings were justified. Despite its decision to withdraw its appeal as a result of the introduction of its new auto policy, India indicated that the findings contained in Section VIII were outside of the Panel's terms of reference and were both factually and legally incorrect. India requested that the DSB adopt only a part of the Panel Report and consider the adoption of Section VIII only at its next meeting. The EC responded that the Reports should be adopted unconditionally by the parties, thus there was no justification for India's request. The DSB proceeded with the adoption in full of the Appellate Body and Panel reports.

Implementation of adopted reports

On 2 May 2002, India informed the DSB that it would need a reasonable period of time to implement the recommendations and rulings of the DSB and that it was ready to enter into discussions with the EC and the US in this regard.

On 18 July 2002, the parties informed the DSB that they had mutually agreed that the reasonable period of time to implement the recommendations and rulings of the DSB, shall be five months, that is from 5 April 2002 to 5 September 2002.

On 6 November 2002, India informed the DSB that it had fully complied with the recommendations of the DSB in this dispute by issuing Public Notice No. 31 on 19 August 2002 terminating the trade balancing requirement. India also informed that earlier it had removed the indigenization requirement vide Public Notice No. 30 on 4 September 2001.

US –Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, WT/DS 436/AB/R (19 December 2014)

Short title:	US — Carbon Steel (India)

Key facts

Complainant:	*India*
Respondent:	*United States*
Third Parties:	*Australia; Canada; China; European Union; Saudi Arabia, Kingdom of; Turkey*
Agreements cited: (as cited in request for consultations)	*GATT 1994: Art. I, VI* - *Subsidies and Countervailing Measures:* *Art.1, 2, 10, 11, 12, 13, 14, 15, 19, 21, 22, 32* *Agreement Establishing the World Trade Organization: Art. XVI:4*
Request forConsultationsreceived:	*12 April 2012*
Panel Report circulated:	*14 July 2014*
Appellate BodyReportcirculated:	*8 December 2014*

Consultations Complaint by India.

On 12 April 2012, India requested consultations with the United States with regard to the imposition of countervailing duties by the United States on certain hot rolled carbon steel flat products from India (—subject goods‖).

India challenges countervailing duties levied on those products through various instruments, as well as provisions of the US Tariff Act and Code of Federal Regulations on customs duties. India claims that the countervailing duty investigation and related measures are inconsistent with Articles I and VI of the GATT 1994 and with Articles 1, 2, 10, 11, 12, 13, 14, 15, 19, 21 and 22 of the SCM Agreement. India also claims that the challenged provisions of US Law are inconsistent —as such‖ with Articles 12, 14, 15, 19 and 32 of the SCM Agreement.

On 7 May 2012, Canada requested to join the consultations.

On 12 July 2012, India requested the establishment of a panel. At its meeting on 23 July 2012, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

At its meeting on 31 August 2012, the DSB established a panel. Australia, Canada, China, the European Union, Saudi Arabia and Turkey reserved their third-party rights. On 7 February 2013, India requested the Director-General to determine the composition of the panel. On 18 February 2013, the Director-General composed the panel. On 8 July 2013, the Chair of the panel informed the DSB that the panel expected to issue its final report to the parties by April 2014, in accordance with the timetable adopted after consultation with the parties.

On 14 July 2014, the panel report was circulated to Members.

Summary of key findings

This dispute concerned the imposition by the United States of countervailing duties on imports of certain hot-rolled carbon steel flat products from India. India challenged certain provisions of the United States Tariff Act, 1930, as codified in the United States Code (USC), and the United States Code of Federal Regulations (CFR). In addition, India challenged a number of measures relating to the application of the USC and CFR in the context of the countervailing original investigation and subsequent reviews at issue. India's claims pertained to various procedural and substantive provisions

of the SCM Agreement and, consequently, to Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement.

With regard to the United States' request for preliminary ruling relating to the scope of these proceedings, the Panel concluded that India's claims that the United States acted inconsistently with Articles 11.1, 11.2 and 11.9 of the SCM Agreement in connection with the alleged initiation of an investigation, despite the insufficiency of evidence in the domestic industry's written application, fell outside the Panel's terms of reference. The Panel dismissed the United States' remaining preliminary objections to India's claims.

With regard to India's claims that were within the scope of these proceedings, the Panel concluded that the United States acted inconsistently with:

in connection with the provision of high grade iron ore by the NMDC:

Article 2.1(c) of the SCM Agreement by failing to take account of all the mandatory factors in its determination of de facto specificity regarding NMDC; and

Article 14(d) of the SCM Agreement by failing to consider the relevant domestic price information for use as Tier I benchmarks, in respect of which the United States sought to rely on ex post rationalization;

in connection with the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme:

Article 12.5 of the SCM Agreement by failing to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information;

Article 1.1(a)(1)(iii) of the SCM Agreement by determining without sufficient evidentiary basis that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the Captive Mining of Coal Programme/Coal Mining Nationalization Act; and

Article 14(d) of the SCM Agreement in connection with the USDOC's rejection of certain domestic price information when assessing benefit in respect of mining rights for iro nore;

Article15.3 of the SCM Agreement, with respect to Section1677(7)(G) ‒as such‖and ‒as applied‖ in the original investigation at issue, in connection with the ―cross-cumulation‖ of the effects of imports that are subject to a CVD investigation with the effects of imports that are not subject to simultaneous CVD investigations;

Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, with respect to Section 1677(7)(G)

―as such‖ and ―as applied‖ in the original investigation at issue, in connection with injury assessments based on inter alia the volume, effects and impact of non-subsidized, dumped imports;

Article 12.7 of the SCM Agreement by applying ―facts available‖ devoid of any factual foundation in connection with the following determinations:

JSW received iron ore from NMDC at no charge during the period covered by the 2006 administrative review;

VMPL used and benefited from the 1993 KIP, 1996 KIP, 2001 KIP and 2006 KIP subsidy programmes;

Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes under the 2001 JSIP: (1) capital investment incentive; (2) feasibility study and project report cost reimbursement;

incentive for quality certification; and (4) employment incentives;

Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes: (1) 6 programmes at issue administeredbytheSGOG;(2)8programmesatissueadministeredbytheSGOM;

(3) 10 programmes at issue administered by the SGAP; (4) 9 programmes at issue administered by the SGOC; and (5) 22 programmes at issue administered by the SGOK;

Tata used and benefited from the subsidy provided through the purchase of high- grade iron ore from NMDC during the period covered by the 2008 administrative review;

Tata used and benefited from the MDA and MAI subsidy programmes during the period covered by the 2008 administrative review;and

Tata used and benefited from the six sub-programmes of the SEZ Act at issue during the period covered by the 2008 administrative review;

Article 22.5 of the SCM Agreement by failing to provide adequate notice of the USDOC's consideration of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore.

The Panel exercised judicial economy in connection with a small number of India's claims, and rejected India's remaining claims.

On 8 August 2014, India notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report. On 13 August 2014, the United States filed an other appeal in the same dispute. On 6 October 2014, the Chair of the Appellate Body informed the DSB that it estimated that the Appellate Body report would be circulated no later than 8 December 2014.

On 8 December 2014, the Appellate Body report was circulated to Members.

Summary of key findings Public Body

India appealed the Panel's findings regarding the USDOC's determination that the National Mineral Development Corporation (NMDC) is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. For its part, the United States argued that the Panel interpreted and applied Article 1.1(a)(1) in a manner consistent with the Appellate Body report in US — Anti-Dumping and Countervailing Duties (China). Further, the United States requested, in its other appeal, that the Appellate Body clarify that —an entity that is controlled by the government, such that the government may use the entity's resources as its own‖ is also a public body. The Appellate Body recalled that a public body is —an entity that possesses, exercises or is vested with governmental authority‖, and explained that whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. The Appellate Body found that the Panel erred in its application of Article 1.1(a)(1) to the USDOC's public body determination in the underlying investigation, in effect treating the GOI's ability to control the NMDC as determinative for purposes of establishing whether the NMDC constitutes a public body. The Appellate Body consequently reversed the Panel's findings, and completed the legal analysis and found that the USDOC's determination that the NMDC is a public body is inconsistent with Article1.1(a)(1).

Financial Contribution

India appealed the Panel's findings regarding whether India's captive mining rights and Steel Development Fund (SDF) loans constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement. Finding that the Panel correctly determined that there was a reasonably proximate relationship between India's grant of mining rights for iron ore and coal and the beneficiary's use or enjoyment of the final extracted goods, the Appellate Body upheld the Panel's finding in respect of Article 1.1(a)(1)(iii). With respect to SDF loans, the Appellate Body found that the Panel correctly found that the role of the SDF Managing Committee in making critical decisions regarding the issuance and terms of the SDF loans supported a conclusion that the SDF loans constitute direct transfers of funds, and upheld the Panel's finding in respect of Article1.1(a)(1)(i).

Benefit

India appealed multiple findings of the Panel concerning Section 351.511(a)(2)(i)-(iv) of the United States Code of Federal Regulations, setting forth the US benchmarking mechanism for calculating benefit. The Appellate Body rejected India's —as such‖ claims regarding benefit benchmark selection. Although the Appellate Body disagreed with the Panel to the extent it suggested that investigating authorities could, at the outset, discard all prices of government-related entities in a benchmark analysis, the Appellate Body considered that, under Section 351.511(a)(2)(i), the USDOC is required to consider in its benchmark analysis all market-determined prices in the country of provision for the good in question, including such prices of government-related entities other than the entity providing the financial contribution. The Appellate Body also rejected India's —as such ‖ claims that the Panel erred in finding that Article 14(d) permits the use of out-of-country benchmarks in situations in which the government is not the predominant provider of the good in question, and that Section 351.511(a)(2)(ii) requires the USDOC to make adjustments to out-of-country benchmarks to ensure that such benchmarks reflect prevailing market conditions in the country of provision. The Appellate Body also rejected India's claims that the Panel erred in finding that the use of —as delivered‖benchmarks under Section351.511(a)(2)(iv) is not –as such‖inconsistent with Article 14(d). Contrary to India's suggestion, the Appellate Body did not consider that the US benchmarking mechanism precludes adjustments to benchmarks to reflect delivery charges that approximate the generally applicable delivery charges for the good in question in the country of provision.

India also advanced several —as applied‖ claims under Article 14 of the SCM Agreement. Regarding iron ore provided by the NMDC, the Appellate Body found that the Panel erred by suggesting that government prices are not an indicator of prevailing market conditions, and reversed the Panel's finding rejecting India's claim that the USDOC's exclusion of the NMDC's export prices from its benchmark is inconsistent with Article 14(d). The Appellate Body completed the legal analysis and found that the USDOC's exclusion of such export prices is inconsistent with Article 14(d). The Appellate Body also reversed the Panel's finding rejecting India's claim that the use of benchmarks from Australia and Brazil is inconsistent with Article 14(d), finding that the Panel had not properly concluded that the —as delivered‖ prices at issue reflect prevailing market conditions in India. The Appellate Body also found that the USDOC had not provided a reasoned and adequate explanation of the basis for its use of these —as delivered‖ prices. The Appellate Body completed the legal analysis and found that the USDOC's use of these prices as benchmarks is inconsistent with Article 14(d) of the SCM Agreement. Regarding India's claim in respect of captive mining rights, the Appellate Body found it permissible for an investigating authority to construct a government price in a benefit calculation, and upheld the Panel's finding rejecting India's claim that the USDOC's construction of government prices for iron ore and coal is inconsistent with Articles 1.1(b) and 14(d). Regarding India's claim in respect of SDF loans, the Appellate Body found that the Panel improperly excluded consideration of a borrower's costs in assessing the cost of a loan programme to the recipient. The Appellate Body reversed the Panel's finding rejecting India's claim as it relates to the USDOC's determination that loans provided under the SDF conferred a benefit under Articles 1.1(b) and 14(b), but found that it was unable to complete the legal analysis.

Specificity

India appealed aspects of the Panel's analysis concerning the USDOC's determination that the sale of iron ore by the NMDC is specific within the meaning of Article 2.1(c) of the SCM Agreement because it concerns the—use of a subsidy programme by a limited number of certain enterprises. The Appellate Body upheld each of the Panel's findings challenged by India in respect of Article 2.1(c), namely: that there was no obligation on the USDOC to establish that only a —limited number‖ within the set of —certain enterprises‖ actually used the subsidy programme; that specificity need not be establishedonthebasisofdiscriminationinfavourof—certainenterprises‖againstabroadercategory of other, similarly situated entities; and that, if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, it is not necessary, in establishing specificity, that the subsidy be limited to a subset of this industry.

Facts Available India appealed aspects of the Panel's interpretation and application of Article 12.7 of the SCM Agreement. India's appeal concerned the —as such‖ and certain —as applied‖ findings of the Panel regarding Section 1677e(b) of the United States Code and Section 351.308(a)-(c) of the United States Code of Federal Regulations. The Appellate Body reaffirmed that an investigating authority must use those —facts available‖ that reasonably replace the missing information with a view to arriving at an accurate determination, and it modified the Panel's interpretation of Article 12.7 to the extent that the Panel's interpretation excluded, in all instances, a comparative evaluation of all available evidence. The Appellate Body found, in this regard, that Article 12.7 calls for a process of evaluation of available evidence to be reflected in the determination, the extent and nature of which depends on the particular circumstances of a given case.

The Appellate Body found further that the Panelfailed,underArticle11oftheDSU,tomakeanobjectiveassessmentofIndia's—assuch‖claim, because the Panel disregarded certain evidence submitted by the parties regarding the meaning of the challenged US measures. The Appellate Body thus reversed the Panel's rejection of India's —as such‖ claim under Article 12.7 and sought to complete the legal analysis, finding that India had not established that Section 1677e(b) of the United States Code and Section 351.308(a)-(c) of the United States Code of Federal Regulations are inconsistent —as such‖ with Article 12.7 of the SCM Agreement. Regarding India's —as applied‖ claims under Article 12.7 of the SCM Agreement, theAppellateBodyfoundthatthePaneldidnotapplyan—unnecessaryburdenofproof‖regardingthe applicationofanalleged–rule‖onselectingthehighestnon-deminimissubsidyratesintheinstances identified by India. It thus upheld the Panel's finding that India failed to establish a prima facie case of inconsistency with Article 12.7 in that regard.

New Subsidy Allegations

India appealed the Panel's finding rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement. The Appellate Body held that, in principle, Articles 21.1 and 21.2 permit investigating authorities to examine new subsidy allegations in the conduct of an administrative review. Such examination, while subject, mutatis mutandis, to the public notice requirements set out in Article 22, are not subject to the obligations set out in Articles 11 and 13. Accordingly, while the Appellate Body upheld the Panel's finding rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, and 21.2 of the SCM Agreement, the Appellate Body reversed the Panel's finding rejecting India's claims as they relate to inconsistency under Articles 22.1 and 22.2. However, the Appellate Body was unable to complete the legal analysis in respect of India's claims under Articles 22.1 and22.2.

Cross-Cumulation

Finally, the United States appealed the Panel's finding that Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement do not authorize investigating authorities to assess cumulatively the effects of subsidized imports with the effects of non-subsidized, but dumped imports. Although the Appellate Body found that the Panel did not err in this regard, it found that the Panel failed to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter in finding that Section 1677(7)(G) of the United States Code is inconsistent –as such‖with Article 15. Completing the legal analysis with respect to one part of Section 1677(7)(G), the Appellate Body found that Section 1677(7)(G)(iii) of the United States Code is inconsistent —as such‖ with Article 15 of the SCM Agreement.

At its meeting on 19 December 2014, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

Reasonable period of time

At the DSB meeting on 16 January 2015, the United States stated that it intended to implement the DSB's recommendations and ruling in a manner that respects its WTO obligations and that it would need a reasonable period of time to do so. On 24 March 2015, India and the United States informed the DSB that they had agreed that the reasonable period of time for the United States to implement the DSBrecommendationsandrulingsshallbe15monthsfromthedateofadoptionoftheAppellate

Body and panel reports. Accordingly, the reasonable period of time was set to expire on 19 March 2016. On 9 March 2016, India and the United States informed the DSB that they had mutually agreed to modify the previously notified reasonable period of time for implementation of the recommendations and rulings of the DSB so as to expire on 18 April 2016.

Implementation of adopted reports

At the DSB meeting on 22 April 2016, the United States stated that with respect to the United States International Trade Commission (USITC) determination, on 7 March 2016, the USITC issued a new determination rendering the findings with respect to injury in the underlying proceeding on the product from India consistent with the DSB recommendations and rulings in this dispute. The United States further indicated that, with respect to the United States Department of Commerce (USDOC) determination, on 14 April 2016, the USDOC issued a new final determination rendering its determination with respect to subsidization and the calculation of countervailing duty rates consistent with the DSB recommendations and rulings in this dispute. Accordingly, the United States considered that it had completed implementation with respect to the DSB recommendations and rulings in this dispute.

On 6 May 2016, India and the United States informed the DSB of Agreed Procedures under Articles 21 and 22 of the DSU.

India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS 456, 6 Feb. 2013 (Appellate Body Report, 16 Sept. 2016)

Key facts

Short title:	*India — Solar Cells*
Complainant:	*United States*
Respondent:	*India*
Third Parties:	*Brazil; Canada; China; European Union; Japan; Korea, Republic of; Malaysia; Norway; Russian Federation; Turkey; Ecuador; Saudi Arabia, Kingdom of; Chinese Taipei*
Agreements cited: *(as cited in request for consultations)*	*GATT 1994: Art. III:4* *Trade-Related Investment Measures (TRIMs): Art. 2.1* *Subsidies and Countervailing Measures: Art. 3.1(b), 3.2, 5(c), 6.3(a), 6.3(c), 25*
Request for Consultations received:	*6 February 2013*
Panel Report circulated:	*24 February 2016*
Appellate Body Report circulated:	*16 September 2016*
Current Status:	*Report(s) adopted, with recommendation to bring measure(s) into conformity on 14 October 2016*

Consultations

Complaint by the United States.

On 6 February 2013, the United States requested consultations with India concerning certain measures of India relating to domestic content requirements under the Jawaharlal Nehru National Solar Mission (―NSM‖) for solar cells and solar modules.

The United States claims that the measures appear to be inconsistent with:

Article III:4 of the GATT1994;

Article 2.1 of the TRIMs Agreement; and

Articles 3.1(b), 3.2, 5(c), 6.3(a) and (c), and 25 of the SCM Agreement.

The United States also claims that the measures appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

On 13 February 2013, Japan requested to join the consultations. On 21 February 2013, Australia requested to join the consultations.

On 10 February 2014, the United States requested supplementary consultations concerning certain measures of India relating to domestic content requirements under ―Phase II‖ of the Jawaharlal Nehru National Solar Mission (―NSM‖) for solar cells and solar modules.

On 21 February 2014, Japan requested to join the consultations.

On 14 April 2014, the United States requested the establishment of a panel. At its meeting on 25 April 2014, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

At its meeting on 23 May 2014, the DSB established a panel. Brazil, Canada, China, the European Union, Japan, Korea, Malaysia, Norway, the Russian Federation and Turkey reserved their third party rights. Subsequently, Ecuador, Saudi Arabia and Chinese Taipei reserved their third party rights. Following the agreement of the parties, the panel was composed on 24 September 2014.

On 24 March 2015, the Chair of the panel informed the DSB that the panel expects to issue its final report to the parties by late August 2015, in accordance with the timetable adopted after consultation with the parties.

On 24 February 2016, the panel report was circulated to Members. A day later, on 25 February 2016, the Chair of the panel informed the DSB that it had issued the final report to the parties on 28 August 2015 and that public circulation of the report was originally scheduled for late December 2015. However, due to several requests from the parties that the circulation be delayed due to continuing discussions relating to the dispute, the circulation of the panel report was delayed until 24 February 2016.

Summary of key findings

The claims brought by the United States concern domestic content requirements (DCR measures) imposed by India in the initial phases of India's ongoing National Solar Mission. These requirements, which are imposed on solar power developers selling electricity to the government, concern solar cells and/or modules used to generate solar power.

The Panel found that the DCR measures are trade-related investment measures covered by paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement. The Panel found that this suffices to establish that they are inconsistent with both Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The Panel decided nonetheless to assess the parties' additional arguments under Article III:4 of the GATT 1994, and found that the DCR measures do accord ‒less favourable treatment‖ within the meaning of that provision.

Concerning the government procurement derogation in Article III:8(a) of the GATT 1994, the Panel found that the DCR measures are not distinguishable in any relevant respect from the domestic content requirements previously examined under this provision by the Appellate Body in Canada — Renewable Energy / Feed-In Tariff Program. Following the Appellate Body's interpretation of Article III:8(a) of the GATT 1994 in that case, the Panel found that the discrimination relating to solar cells and modules under the DCR measures is not covered by the government procurement derogation in Article III:8(a) of the GATT 1994. In particular, the Panel found that the electricity purchased by the government is not in a ‒competitive relationship with the solar cells and modules subject to discrimination under the DCR measures.

India argued that the DCR measures are justified under the general exception in Article XX(j) of the GATT 1994, on the grounds that its lack of domestic manufacturing capacity in solar cells and modules, and/or the risk of a disruption in imports, makes these‒products in general or local short supply‖ within the meaning of that provision. The Panel found that the terms ―products in general or local short supply‖ refer to a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market. The Panel also found that the terms ―products in general or local short supply‖ do not cover products at risk of becoming in short supply, and found that in any event India had not demonstrated the existence of any imminent risk of a short supply. The Panel therefore found that India failed to demonstrate that the challenged measures are justified under Article XX(j).

India argued that the DCR measures are also justified under Article XX(d) of the GATT 1994, on the grounds that they secure India's compliance with ‒laws or regulations‖ requiring it to take steps to promote sustainable development. The Panel considered that international agreements may constitute

―laws or regulations‖ within the meaning of Article XX(d) only insofar as they are rules that have ‒direct effect‖ in, or otherwise form part of, the domestic legal system of the Member concerned. The Panel found that most of the instruments identified by India did not constitute ‒laws or regulations‖ within the meaning of Article XX(d), or were not laws or regulations in respect of which the DCR measures ‒secure compliance‖. Therefore, the Panel found that India failed to demonstrate that the challenged measures are justified under Article XX(d).

On 20 April 2016, India notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report.

On 17 June 2016, upon expiry of the 60-day period provided for in Article 17.5 of the DSU, the Appellate Body informed the DSB that the circulation date of the Appellate Body report in this appeal was to be communicated to the participants and third participants shortly after the oral hearing, in the light of the scheduling of parallel appeals, the number and complexity of the issues raised in this or concurrent appellate proceedings, and the availability of translation services. On 8 July 2016, the Appellate Body informed the DSB that it expected to circulate its report in this appeal no later than 16 September 2016.

On 16 September 2016, the Appellate Body report was circulated to Members.

Summary of key findings

The Panel sustained the United States' claims that India's DCR measures are inconsistent with WTO non-discrimination obligations under Article III:4 of the GATT 1994 and Article 2.1 of the

TRIMs Agreement. The Panel also found that the measures are not covered by the government procurement exemption under Article III:8(a) of the GATT 1994, because the product being procured (electricity)wasnotina–competitiverelationship‖withtheproductdiscriminatedagainst(solarcells and modules). Moreover, the Panel found that India had not demonstrated that its measures are justified under Article XX(j), applicable to measures that are essential to the acquisition or distribution of ―products in general or local short supply‖, or Article XX(d), which establishes a general exception for measures necessary to ―secure compliance‖ with a WTO Member's ―laws or regulations‖ which are not themselves GATT-inconsistent. The Appellate Body upheld each of these Panel conclusions appealed byIndia.

With respect to Article III:8(a), the Appellate Body found that the Panel was properly guided by the Appellate Body's report in Canada — Renewable Energy / Canada — Feed-in Tariff Program, where the Appellate Body interpreted and applied Article III:8(a) to closely analogous facts involving the purchase of electricity and discrimination against generation equipment. Regarding Article XX(j), the Appellate Body stated that an assessment of whether products are in short supply should take into account the quantity of available supply of a product from all domestic and international sources, and that consideration should be given to all relevant factors, including the availability of imports, the level of domestic production, potential price fluctuations in the relevant market, and the purchasing power of foreign and domestic consumers. As for Article XX(d), the Appellate Body explained that in determining whether a respondent has identified a –rule that falls within the scope of –laws or regulations‖ under Article XX(d), it may be relevant for a panel to consider factors such as the degree of normativity of the domestic or international instrument and the extent to which it operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member.

One Appellate Body Member attached a separate opinion offering remarks regarding how he viewed the Appellate Body's adjudicatory function as well as its limits, and, consequently, why in his view the Division did — or did not — need to rule on certain of the issues appealed.

At its meeting on 14 October 2016, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

Reasonable period of time

On 8 November 2016, India informed the DSB that, pursuant to Article 21.3 of the DSU, it intended to implement the DSB's recommendations and rulings in this dispute. On 1 December 2016, the United States and India informed the DSB that in order to allow sufficient time for them to discuss a mutually agreed period, they had agreed on deadlines for arbitration under Article 21.3(c) of the DSU.

On 16 June 2017, India and the United States informed the DSB that they had agreed that the reasonable period of time to implement the DSB's recommendations and rulings would be 14 months. Accordingly, the reasonable period of time was set to expire on 14 December 2017

Union of India v. Kumho Petrochemicals Co. Ltd.

(2017) 8 SCC 307

Dr A.K. Sikri, J.— On the demand raised by the indigenous industry, original/ordinary investigation concerning imports of acrylonitrile butadiene rubber (hereinafter referred to as "the product") was taken up sometime in March 1996 for the purpose of levy of anti-dumping duty on the said import from Korea RP and Germany. The primary finding to this effect came to be published on 17-7-1997 whereby the Designated Authority recommended definitive anti-dumping duty. That resulted into issuance of the Notification dated 30-7-1997 by the Central Government whereby anti-dumping duty was imposed under Section 9-A of the Customs Tariff Act, 1975 (for short "the Act") on the said product. Before the expiry of five years' period during which anti-dumping duty remains operative, the first sunset review investigation was initiated by the Authority which recommended continued levy of anti-dumping duty. It resulted into another Notification dated 10-10-2002. As per this Notification, the anti-dumping duty was to remain in force till 10-10-2007. Just before that, on 8-10-2007, second sunset review investigation was initiated by the authority, which resulted in recommendation dated 4-10-2008 for continued imposition of anti-dumping duty on imports of the product from Korea RP. On the basis of this recommendation, another Notification dated 2-1-2009 was issued by the Central Government, which was to remain in force till 1-1-2014. On 31-12-2013, that is, one day before the aforesaid Notification was to lapse, third sunset review investigation in respect of duty imposed on the imports of the subject product from Korea RP was initiated. Pursuant to the initiation of the said sunset review investigation, the Central Government issued Notification No. 6/2014-Customs dated 23-1-2014 thereby extending the validity of duty by one year i.e. up to 1-1-2015, pending investigation. This was done in exercise of powers contained in the second proviso to sub-section (5) of Section 9-A of the Act.

2. The aforesaid Notification dated 23-1-2014 came to be challenged by filing writ petitions by M/s Kumho Petrochemicals Co. Ltd. (Respondent 1 herein), who is a purchaser and exporter of the product from Korea RP, as well as by Fairdeal Polychem LLP (an importer of product from Korea RP). The High Court has, vide impugned judgment dated 11-7-2014 [Kumho Petrochemicals Co. Ltd. v. Union of India, 2014 SCC OnLine Del 3546 : (2014) 7 High Court Cases (Del) 98] , decided both the writ petitions. It has partly allowed these writ petitions holding that the order of continuation of anti-dumping duty, made after expiry of the duty period, is bad in law. However, another contention of the two writ petitioners, namely, the initiation of the anti-dumping duty investigation was also bad in law on the ground that public notice of initiation was not published in the Official Gazette before 1-1-2014 i.e. before the expiry of the anti-dumping duty at the end of five years' period, has not been accepted by the High Court. Repelling this argument, it is held by the High Court that public notice of initiation need not be published in the Official Gazette and that public notice is not a prerequisite for initiation of an investigation, which can be issued within a proximate period of time after its initiation.

3. The Union of India and Automotive Manufacturers Association in India felt aggrieved by that part of the judgment whereby extension of anti-dumping duty has been allowed to be bad in law. Their appeals challenge that part of the order. On the other hand, the writ petitioners are not satisfied with the outcome of the second issue about the initiation of anti-dumping duty. This part is challenged by these two writ petitioners. M/s Omnova Solution (P) Ltd. is the other appellant which is also a domestic industry and has challenged the orders by filing two writ petitions thereby supporting the stand of the Union of India and Manufacturers Association. It is for this reason all these appeals are heard analogously, which we propose to decide by this common judgment.

4. Few dates which are material to appreciate the controversy and the stand which is taken by the respective parties need to be recapitulated. Since we are concerned with the validity of initiation of the third sunset review as well as the Notification dated 23-1-2014 vide which earlier notification was amended and extended for a period of one year under Section 9-A of the Act, we will mention those dates which revolve around the aforesaid controversy.

5. As mentioned above, after the second sunset review, the Notification dated 2-1-2009 was issued extending the period of anti-dumping duty for another five years i.e. till 1-1-2014. On 31-12-2013, a day before the period of the aforesaid notification was to expire, the third sunset review was initiated. However, the Notification dated 31-12-2013 was made available only on 6-1-2014 i.e. after the expiry of original notification. Thereafter, the Notification dated 23-1-2014 was issued amending the earlier Notification dated 2-1-2009 so as to make it remain in force till 1-1-2015. This power of interim measure, pending review exercise is enshrined in the second proviso to Section 9-A(5) of the Act.

6. The entire scheme of anti-dumping is contained in Section 9-A of the Act which reads as under:

"9-A. Anti-dumping duty on dumped articles.—(1) Where any article is exported by an exporter or producer from any country or territory (hereafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

Explanation.—For the purposes of this section—

(a) "margin of dumping" in relation to an article, means the difference between its export price and its normal value;

(b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);

(c) "normal value", in relation to an article, means—

(i) the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either—

(a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub-section (6):

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined—

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

(2-A) Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), unless specifically made applicable in such notification or such imposition, as the case may be, shall not apply to articles imported by a hundred per cent export-oriented undertaking or a unit in a free trade zone or in a special economic zone.

Explanation.—For the purposes of this section, the expressions "hundred per cent export-oriented undertaking", "free trade zone" and "special economic zone" shall have the meanings assigned to them in Explanation 2 to sub-section (1) of Section 3 of the Central Excise Act, 1944.

(3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that—

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

(ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied,

(4) The anti-dumping duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(5) The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:

Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension:

Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing such rules may provide for the manner in which articles liable for any anti-dumping duty under this section may be identified and for the manner in which the export price and the normal value of and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.

(6-A) The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer:

Provided that where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.

(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

(8) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short-levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

7. We are concerned with sub-section (5) of Section 9-A of the Act which lays down that anti-dumping duty imposed under the said provision, unless revoked earlier, ceases to have effect on the expiry of five years from the date of such imposition. It means that such a notification has maximum life of 5 years. Thus, in normal course, the Notification dated 2-1-2009 would have come to an end on 1-1-2014. However, the first proviso to sub-section (5) of Section 9-A of the Act empowers the Central Government to extend the period of such imposition for a further period of five years after undertaking a review. The second proviso stipulates that where a review is initiated before the expiry of the aforesaid period of five years, but the authority has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force for a further period not exceeding one year. This second proviso, thus, is to provide a stopgap arrangement to take care of those contingencies where review exercise, though initiated earlier, could not be concluded during the currency of anti-dumping duty period specified in the notifications. It is in exercise of this power contained in the second proviso to sub-section (5) of Section 9-A of the Act that the Notification dated 23-1-2014 was issued extending the validity by another year, pending outcome of the sunset review.

8. At this juncture, we shall reproduce relevant texts of the Notification dated 31-12-2013 vide which sunset review was initiated, as well as the Notification dated 23-1-2014 vide which earlier Notification dated 2-1-2009 was amended by extending its validity by another year:

Notification dated 31-12-2013

"To be published in Part I Section I of the Gazette of India Extraordinary

F. No. 15/29/2013-DGAD

Government of India

Department of Commerce and Industry

(Directorate General of Anti-Dumping and Allied Duties)

Udyog Bhavan, New Delhi 110 011

Dated 31-12-2013

Notification

Initiation

Subject: Sunset Review (SSR) Anti-dumping Investigation concerning imports of acrylonitrile butadiene rubber (NBR), originating in or exported from Korea RP.

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2. … Second sunset review investigations were initiated by the authority on 8-10-2007 and the authority recommended continued imposition of anti-dumping duty on imports of the subject goods from Korea RP vide Notification No. 15/6/2007 dated 4-10-2008 and imposed by Finance vide Customs Notification No. 01/2009-Customs dated 2-1-2009.

3. Whereas, M/s Omnova Solutions (India) Pvt. Ltd. have now filed a duty substantiated application before the authority, as the domestic industry of the subject goods in India, in accordance with the Act and the Rules, alleging likelihood of continuation or recurrence of dumping of the subject goods, originating in or exported from Korea RP and consequent injury to the domestic industry and have requested for review, continuation and enhancement of the anti-dumping duties imposed on the imports of the subject goods, originating in or exported from Korea RP.

*****

Initiation of sunset review

7. In view of the duly substantiated application filed and in accordance with Section 9-A(5) of the Act, read with Rule 23 of the Anti-dumping Rules, the authority hereby initiates a sunset review investigation to review the need for continued imposition of anti-dumping duties in force in respect of the subject goods, originating in or exported from the subject country and to examine whether the expiry of such duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry."

Notification dated 23-1-2014

"Government of India

Ministry of Finance

(Department of Revenue)

Notification No. 06/2014-Customs (ADD)

New Delhi, dated 23-1-2014

G.S.R. 48(E). — Whereas, the Designated Authority vide Notification No. 15/29/2013-DGAD dated 31-12-2013, published in the Gazette of India, Extraordinary, Part I Section I dated 31-12-2013, has initiated review, in terms of sub-section (5) of Section 9-A of the Customs Tariff Act, 1975 (51 of 1975) read with Rule 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, in the matter of continuation of anti-dumping duty on 'acrylonitrile butadiene rubber', originating in, or exported from Korea RP, imposed vide Notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 01/2009-Customs, dated 2-1-2009, published in the Gazette of India, Extraordinary, Part II Section 3 sub-section (i), vide G.S.R. 5(E), dated 2-1-2009, and has requested for extension of anti-dumping duty for a further period of one year, in terms of sub-section (5) of Section 9-A of the said Customs Tariff Act;

Now, therefore, in exercise of the powers conferred by sub-sections (1) and (5) of Section 9-A of the Customs Tariff Act, 1975 (51 of 1975) read with Rule 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government hereby makes the following amendment in the Notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 01/2009-Customs, dated 2-1-2009, published in the Gazette of India, Extraordinary, Part II Section 3 sub-section (i), vide G.S.R. 5(E), dated 2-1-2009, namely:

In the said notification, after Para 2, the following shall be inserted, namely—

'3. Notwithstanding anything contained in Para 2, this notification shall remain in force up to and inclusive of the 1st day of January, 2015, with respect to anti-dumping duty on acrylonitrile butadiene rubber originating in, or exported from Korea RP, unless revoked earlier.'

[F. No. 354/179/2002-TRU (Pt. V)]

(Raj Kumar Digvijay)

Under-Secretary to the Government of India"

9. Having noted the material dates, the relevant text of the notifications as well as the statutory scheme provided under Section 9-A of the Act, we may now formulate the two questions that arise for consideration in these appeals:

9.1. After the second sunset review investigation, the Notification dated 2-1-2009 was issued extending the anti-dumping duty that was imposed by the initial notification. This notification was valid for a period of five years i.e. up to 1-1-2014. Though, the third sunset review was initiated and the Notification dated 31-12-2013 was issued which was before the expiry of five years' period i.e. 1-1-2014, according to the writ petitioners, this notification proposing the review was made public only on 6-1-2014. As per them, the date of reckoning would, therefore, be publication of the notification, namely, 6-1-2014, which has to be taken into consideration for setting into motion the sunset review. Since it happened after the expiry of original notification, the exercise of undertaking sunset review was impermissible. Therefore, the first question is:

(i) Whether the date of 31-12-2013 or it is 6-1-2014, which would be the relevant date for determining initiation of the sunset review?

9.2. The amendment Notification dated 23-1-2014, amending Notification dated 2-1-2009 by allowing it to remain in force till 1-1-2015 was issued after the original notification had expired on 1-1-2014. The question is:

(ii) Whether such a notification issued after the expiry date of the original notification is without any legal authority and is, therefore, null and void?

10. We now proceed to discuss and answer these questions in seriatim.

Question (i)

11. It is not in dispute that in terms of Section 9-A(5) of the Act, anti-dumping duty is effective for a period not exceeding five years from the date of its imposition. The Government is empowered to revoke the duty imposed even before the expiry of five years. In any case, such a duty admittedly ceases to be operative after five years from the date of imposition. At the same time, the Central Government is empowered to initiate review, called "sunset review", and to investigate and decide as to whether it is necessary to continue the levy of anti-dumping duty. As in the case of original notification imposing such a duty, the Central Government is to satisfy itself that if the period of anti-dumping duty is not extended, it is likely to lead to continuation or recurrence of dumping and injury to the domestic industry. The nature of exercise to be undertaken by the Central Government in a "sunset review" is somewhat different from the initial exercise to determine whether anti-dumping duty is to be levied at all or not. When it comes to review, the focus would be on the issue as to whether withdrawal of anti-dumping duty would lead to continuation or recurrence of dumping as well as injury to the domestic industry. The nature and scope of this exercise is lucidly explained by this Court in Reliance Industries Ltd. v. Designated Authority [Reliance Industries Ltd. v. Designated Authority, (2006) 10 SCC 368] in the following manner: (SCC p. 383, paras 38-39)

"38. We are of the opinion that the nature of the proceedings before the DA are quasi-judicial, and it is well settled that a quasi-judicial decision, or even an administrative decision which has civil consequences, must be in accordance with the principles of natural justice, and hence reasons have to be disclosed by the Authority in that decision vide S.N. Mukherjee v. Union of India [S.N. Mukherjee v. Union of India, (1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445] .

39. We do not agree with the Tribunal [Reliance Industries Ltd. v. Designated Authority, (2001) 127 ELT 99 (Tri)] that the notification of the Central Government under Section 9-A is a legislative act. In our opinion, it is clearly quasi-judicial. The proceedings before the DA are to determine the lis between the domestic industry on the one hand and the importer of foreign goods from the foreign supplier on the other. The determination of the recommendation of the DA and the government notification on its basis is subject to an appeal before Cestat. This also makes it clear that the proceedings before the DA are quasi-judicial."

12. It is a common case that such a sunset review is to initiate before the expiry of five years' period mentioned in the notification. In the present case, no doubt, the Notification which is passed initiating sunset review is dated 31-12-2013. Though we have reproduced relevant portion of this notification, a perusal of the entire notification reveals that it is a detailed notification running into almost fifteen pages wherein history of original investigation concerned the imports of the product in question from Korea RP and Germany is traced out leading to the findings that were arrived at by the authority on the basis of which anti-dumping duty was imposed on the subject goods vide Notification dated 30-7-1997. This notification thereafter deals with the second sunset review which led to passing of further Notification dated 2-1-2009. Thereafter, it mentions that M/s Omnova Solution (P) Ltd. had filed a duly substantiated application on 11-11-2013 before the Authority alleging likelihood of continuation or recurrence of dumping of the subject goods, originating in or exported from Korea RP, and a consequent injury to the domestic market and requested for another review. The notification thereafter deals with the situation of domestic industry, product in question and satisfaction of the Authority that a case was made out for initiation of sunset review investigation to review the need for continued imposition of anti-dumping duty in force in respect of the product in question. The notification therefore calls upon the interested parties to submit relevant information in the prescribed form and manner and furnish their views to the authority for its consideration. Thus, a detailed exercise was done taking into account all the relevant factors in forming the opinion that the sunset review was desirable.

13. Though the Notification is dated 31-12-2013 and published on the same date, it was sent for distribution to Kitab Mahal Book Store on 6-1-2014. The validity would depend upon the issue as to whether 31-12-2013 is the date of reckoning or it is only 6-1-2014.

14. The High Court has answered the question in favour of the Government and against the writ petitioners on the ground that Section 9-A(5) of the Act and its proviso do not mandate a public notice or a gazette notification as a precondition for initiation of sunset review investigation. The reference to publication by Official Gazette is, significantly, in Section 9-A(1) which talks of imposition of anti-dumping duty.

16. It was argued that the aforesaid principle was reiterated in Union of India v. Ganesh Das Bhojraj [Union of India v. Ganesh Das Bhojraj, (2000) 9 SCC 461] . On the basis of this principle contained in the aforesaid judgments, it was submitted that even if the provisions of the statute i.e. Section 9-A, were silent about the publication of the notification, Rules concerned, namely, the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 were to be followed. It was argued that Rule 6(1) of the said Rules required issuance of public notice of initiation of investigation and, thus, having regard to the dicta laid down in the aforesaid judgments prescribing a mode of publication, publication by "extraordinarily recognised Official Gazette", namely, the Official Gazette, had to be resorted to and since it was made available to public only on 6-1-2014, that date has to be treated as the relevant date when the notification came into force, having regard to the ratio of the judgment in Union of India v. Param Industries Ltd. [Union of India v. Param Industries Ltd., (2016) 16 SCC 692 : (2015) 321 ELT 192]

17. Rule 6 of the aforesaid Rules deals with principles governing investigations. Sub-rule (11) thereof mentions that whenever Designated Authority has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, it shall issue a public notice underlying its decision and also mention the particulars/information which shall be provided in the said public notice. This Rule thereafter narrates the procedure which is to be followed which includes providing opportunity to the industrial user of the article under investigation and the respective consumer organisation in cases where the article is commonly sold at the retail level, to furnish information which is relevant to the investigation regarding dumping/injury where applicable, and casualty. The High Court is right that it is in this specific context that the said Rule mentions about issuance of public notice underlying its decision to initiate the investigation. Rule 23 deals with review i.e. review to see the need for the continued imposition of anti-dumping duty and inter alia mentions that provisions of Rule 6 shall be mutatis mutandis applicable in the case of review, meaning thereby the procedure which is mentioned in Rule 6 shall be followed while undertaking review as well. Rule 6, thus, encompasses the principles of natural justice that are to be applied by the Designated Authority while undertaking the exercise of investigations qua imposition of dumping duty. Such a purport of Rule 6 of the Rules is recognised in Automotive Tyre Manufacturers Assn. v. Designated Authority [Automotive Tyre Manufacturers Assn. v. Designated Authority, (2011) 2 SCC 258] , namely, the Designated Authority is to conform to the principles of natural justice, as can be seen from the following discussion in the said judgment: (SCC p. 296, para 82)

"82. … the elaborate procedure prescribed in Rule 6 of the 1995 Rules, which the DA is obliged to adhere to while conducting investigations, we are convinced that duty to follow the principles of natural justice is implicit in the exercise of power conferred on him under the said Rules."

18. The first proviso to Section 9-A(5) of the Act, when read along with Rule 6 of the Rules, do not lead to the conclusion that the intention to review and extend the anti-dumping duty, in the facts of a given case, have to be necessarily published and made available to all, before the expiry of the original notification. Requirement of Section 9-A(5) of the Act is that the sunset review is to be initiated before the expiry of the original period for which the anti-dumping duty prevails. There is no additional requirement of making it public as well, necessarily before the said expiry date.

19. We, thus, agree with the conclusion of the High Court that insofar as requirement of public notice or a gazette notification is concerned, no such stipulation is made in Section 9-A(5) and its proviso. On the other hand, Section 9-A(1), which deals with imposition of anti-dumping duty, specifically refers to such an imposition by way of publication in an Official Gazette. Therefore, as far as initiation of review is concerned, once a decision is taken by the Government on a particular date, that would be the relevant date and not the date on which it is made public.

20. As a result, the appeals filed by the writ petitioners in which the finding of the High Court on the aforesaid question is challenged, are dismissed as without any merits.

Question (ii)

21. Ms Pinky Anand, learned Additional Solicitor General, arguing against the aforesaid view taken by the High Court, submitted that once the Central Government decides to hold sunset review and passes an order in this behalf, as was done in the present case vide Notification dated 31-3-2013, it shows that the Central Government is, prima facie, satisfied that there is a justification in the request made by the indigenous industry for continuation of such a duty. Therefore, till this exercise is complete, necessary consequence has to be to continue anti-dumping duty and it is for this reason the second proviso to sub-section (5) of Section 9-A of the Act is added in the statute. Otherwise, it was argued, the very purpose of this proviso stands defeated.

25. MrBasava Prabhu Patil, learned Senior Advocate appearing for domestic industry manufacturing the product in question, supported the aforesaid submission of the learned Additional Solicitor General. He referred to Rule 23(b) of the Rules which, according to him, mandates the Designated Authority to initiate sunset review either suo motu or upon receipt of a duly substantiated petition. Duly substantiated petition implies that the petition should contain sufficient evidence that the cessation of anti-dumping duty is likely to lead to continuation or recurrence of dumping and consequent injury to the domestic industry. In a situation where the Designated Authority has initiated the sunset review investigation based on duly substantiated petition, it follows that the Designated Authority is prima facie satisfied that the cessation of anti-dumping duty is likely to lead to dumping and consequent injury to the domestic industry. Under these circumstances, it is imperative that the anti-dumping duty continues to remain in force pending outcome of the review and there is no room for exercise of any discretion by the Finance Ministry under the second proviso to Section 9-A(5). If the second proviso conferred a discretionary power, it would mean that the Finance Ministry would have to apply its mind and not act mechanically. However, neither the second proviso to Section 9-A(5) nor Rule 23(1-B) of the Rules set out any basis or criteria for the Finance Ministry to exercise its discretion at the stage of initiation of a sunset review.

26. Mr Patil also submitted that the second proviso to Section 9-A(5) does not contemplate issuance of a notification or order, as is in the case of an original levy under Section 9-A(1), or extension of duty for a further period of 5 years consequent to a review under the first proviso to Section 9-A(5). This position is borne out by the Rules, where in respect of duty imposed consequent to a determination in an original or review investigation, a notification is mandated. The requirement of a notification is found only in Rule 18, and Rule 23(3) read with Rule 18, both of which deal with duties consequent to an investigation. On the other hand, the second proviso to Section 9-A(5) provides only that "that anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year" and there is no mention of any affirmative act by the Central Government or the need to issue a notification providing for levy of an anti-dumping duty. Therefore, the proviso does not require any positive act, on the part of the Central Government. It is the Designated Authority, which has not concluded, is sufficient for continuation of the duty for a further period not exceeding one year.

31. Mr V. Lakshmikumaran, Advocate appearing on the other side, attempted to justify the order of the High Court on this aspect with the reasons which the High Court has assigned in support of its conclusion. His argument was that the High Court was right in holding that the second proviso to Section 9-A(5) was only an enabling provision and there could not be automatic extension of anti-dumping duty simply because the "sunset review" exercise was initiated by the Government. He further submitted that the word "may" cannot and should not be read as "shall" in this case. He pointed out that same provision i.e. Section 9-A had used the words "may" and "shall" at different places. Whereas sub-section (1) contained the expression "may", sub-section (5) used the expression "shall", while the second proviso was enacted with the stipulation "may". Likewise, Rule 23(1-B) of the Rules used the expression "shall". From this, argument of MrLakshmikumaran was that the legislature was fully conscious as to which provision was to be made mandatory and which provision was directory in nature. He also argued that Section 9-A was added in the Act by way of amendment after the Indian Government became signatory to the Agreement for Implementation of Article VI of GATT, popularly known as "implementation agreement". It is in the said implementation agreement, need for review was contemplated in Articles 11.1, 11.2 and 11.3 of the implementation agreement which provisions categorically provided that "the duty may remain in force pending the outcome of such a review" which means it was not obligatory that such a duty has to necessarily remain in force during the period when the sunset review is to be undertaken. Since, the implementation agreement uses the expression "may" for continuation of duty pending the outcome of sunset review, same expression was used in the second proviso to Section 9-A(5) of the Act.

33. From the scheme of Section 9-A of the Act, it becomes clear that though the notification for anti-dumping duty is valid for a maximum period of five years, the said period can be extended further with the issuance of fresh notification. For this purpose, it is necessary to initiate the review exercise before the expiry of the original notification, which review is commonly known as "sunset review". There may be situations where the sunset review is undertaken but the review exercise is not complete before the expiry of the period of original notification. It is because of the reason that the exercise of sunset review also demands complete procedure to be followed, in consonance with the principles of natural justice that was followed while imposing the anti-dumping duty in the first instance. To put it otherwise, this exercise contemplates hearing the views of all stakeholders by giving them adequate opportunity in this behalf and thereafter arriving at a conclusion that the continuation of the anti-dumping duty is justified, otherwise injury to the domestic industry is likely to continue or reoccur, if the said anti-dumping duty is removed or varied. Since this exercise is likely to take some time and may go beyond the period stipulated in the original notification imposing anti-dumping duty, in order to ensure that there is no vacuum in the interregnum, the second proviso to sub-section (5) of Section 9-A of the Act empowers the Central Government to continue the anti-dumping duty for a further period not exceeding one year, pending the outcome of such a review. The question, however, is as to whether this extension to fill the void that may be created during the pendency of the sunset review is exercised is automatic, once the decision is taken to have sunset review of the anti-dumping duty or the continuation of such an anti-dumping duty has to be by a proper notification. As noted above, the High Court has held that the second proviso is only an enabling provision and, therefore, power vested in the Central Government under the said proviso has to be specifically exercised, without which the anti-dumping duty cannot continue to remain in force with the lapse of original notification.

34. After giving due consideration to the arguments advanced by the learned counsel for the parties, we are inclined to agree with the High Court that proviso to sub-section (5) of Section 9-A of the Act is an enabling provision. That is very clear from the language of the said provision itself. Sub-section (5) of Section 9-A gives maximum life of five years to the imposition of anti-dumping duty by issuing a particular notification. Of course, this can be extended by issuing fresh notification. However, the words "unless revoked earlier" in sub-section (5) clearly indicate that the period of five years can be curtailed by revoking the imposition of anti-dumping duty earlier. Of course, provision for review is there, as mentioned above, and the Central Government may extend the period if after undertaking the review it forms an opinion that continuation of such an anti-dumping duty is necessary in public interest. When such a notification is issued after review, period of imposition gets extended by another five years. That is the effect of the first proviso to sub-section (5) of Section 9-A. However, what we intend to emphasise here is that even as per sub-section (5), it is not necessary that in all cases anti-dumping duty shall be imposed for a full period of five years as it can be revoked earlier. Likewise, when a review is initiated but final conclusion is not arrived at and the period of five years stipulated in the original notification expires in the meantime, as per the second proviso "the anti-dumping duty may continue to remain in force". However, it cannot be said that the duty would automatically get continued after the expiry of five years simply because review exercise is initiated before the expiry of the aforesaid period. It cannot be denied, which was not even disputed before us, that issuance of a notification is necessary for extending the period of anti-dumping duty. Reason is simple. There no duty or tax can be imposed without the authority of "law". Here, such a law has to be in the form of an appropriate notification and in the absence thereof the duty, which is in the form of a tax, cannot be extracted as, otherwise, it would violate the provisions of Article 265 of the Constitution of India. As a fortiori, it becomes apparent that the Government is to exercise its power to issue a requisite notification. In this hue, the expression "may" in the second proviso to sub-section (5) has to be read as enabling power which gives discretion to the Central Government to determine as to whether to exercise such a power or not. It, thus, becomes an enabling provision.

35. We are conscious of the fact that once sunset review is initiated, such initiation takes place only after a substantiated application/request is filed by the indigenous industry which is examined and a prima facie view is formed by the Central Government to the effect that such a review is necessitated as withdrawal of anti-dumping duty or cessation thereof may be prejudicial to the indigenous industry. Once such an opinion is formed and the sunset review is initiated, in all likelihood the Central Government would make use of the second proviso and issue notification for continuing the said anti-dumping duty. At the same time, it cannot be said that without any overt act on the part of the Central Government, there is an automatic continuation. The learned counsel for the respondent rightfully pointed out that the legislature has consciously used the expressions "may" and "shall" at different places in the same section i.e. Section 9-A of the Act. In such a scenario, it has to be presumed that different expressions were consciously chosen by the legislature to be used, and it clearly understood the implications thereof, therefore, when the word "may" is used in the same section in contradistinction to the word "shall" at other places in that very section, it is difficult to interpret the word "may" as "shall". Therefore, it is difficult to read the word "may" as "shall". Our conclusion gets strengthened when we keep in mind following additional factors.

36. The anti-dumping duty may continue, pending the outcome of the review, for a further period not exceeding one year. Thus, maximum period of one year is prescribed for this purpose which implies that the period can be lesser as well. The Government is, thus, to necessarily form an opinion as to for how much period it wants to continue the anti-dumping duty pending outcome of such a review. Moreover, since the maximum period is one year, if the review exercise is not completed within one year, the effect of that would be that after the lapse of one year there would not be any anti-dumping duty even if the review is pending. In that eventuality, it is only after the review exercise is complete and the Central Government forms the opinion that the cessation of such a duty is likely to lead to continuation or recurrence of dumping and injury, it would issue a notification extending the period of imposition of duty. Therefore, there may be a situation where even when the power is exercised under the second proviso and duty period extended by full one year, the review exercise could not be completed within that period. In that situation, vacuum shall still be created in the interregnum beyond the period of one year and till the review exercise is complete and fresh notification is issued. This situation belies the argument that extension under the second proviso is to be treated as automatic to avoid the hiatus or vacuum in between.

38. With this, we advert to the second facet of the argument, namely, whether it was permissible for the Central Government to issue the Notification dated 23-1-2014 thereby extending the validity of duty by one year i.e. after the period of earlier notification came to an end on 1-1-2014? If so, whether this notification would take effect from 1-1-2014 or 23-1-2014?

39. As noticed above, the High Court has held that once the earlier notification by which anti-dumping duty was extended by five years i.e. up to 1-1-2014, expired, the Central Government was not empowered to issue any notification after the said date, namely, on 23-1-2014, inasmuch as there was no notification in existence the period whereof could be extended. The High Court, in the process, has also held that the notification extending anti-dumping duty by five years i.e. up to 1-1-2014 was in the nature of temporary legislation and validity thereof could be extended, in exercise of powers contained in the second proviso to sub-section (5) of Section 9-A of the Act only before 1-1-2014.

40. We do not find any infirmity in the aforesaid approach of the High Court in interpreting the second proviso to Section 9-A(5) of the Act. The High Court has rightly interpreted the aforesaid provision in the light of Articles 11.1, 11.2 and 11.3 of the Agreement for Implementation and Article VI of the GATT, commonly known as "implementation agreement". These clauses read as under: (Kumho Petrochemicals case [Kumho Petrochemicals Co. Ltd. v. Union of India, 2014 SCC OnLine Del 3546 : (2014) 7 High Court Cases (Del) 98] , SCC OnLine Del para 22)

"22. … '11.1. An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2. The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3. Notwithstanding the provisions of paras 1 and 2, any definite anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under para 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiate or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.' "

41. Obviously, sub-section (5) of Section 9-A is in tune with the aforesaid articles of the implementation agreement and is to be interpreted in that hue.

42. India is a signatory to the Marrakesh Agreement establishing the World Trade Organisation in 1994. Pursuant to this, it has implemented the Agreement on Implementation of Article VI of the GATT, 1994 referred to as the Anti-dumping Agreement (ADA), which is one of the agreements that forms part of the WTO treaty. In terms of Article 18.4 of the ADA, each member country is required to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the ADA. As a consequence, Section 9-A, Section 9-AA, Section 9-B and Section 9-C of the Act were enacted.

43. Two things which follow from the reading of Section 9-A(5) of the Act are that not only the continuation of duty is not automatic, such a duty during the period of review has to be imposed before the expiry of the period of five years, which is the life of the notification imposing anti-dumping duty. Even otherwise, Notification dated 23-1-2014 amends the earlier Notification dated 2-1-2009, which is clear from its language, and has been reproduced above. However, when Notification dated 2-1-2009 itself had lapsed on the expiry of five years i.e. on 1-1-2014, and was not in existence on 23-1-2014 question of amending a non-existing notification does not arise at all. As a sequitur, amendment was to be carried out during the lifetime of the Notification dated 2-1-2009. The High Court, thus, rightly remarked that the Notification dated 2-1-2009 was in the nature of temporary legislation and could not be amended after it lapsed.

44. For this reason, plea taken by the Union of India and the domestic industry in their appeals has to fail. Consequently, their appeals are also dismissed.

EVEREADY INDUSTRIES INDIA LTD v. UNION OF INDIA AND ANR.

IN THE HIGH COURT OF DELHI

Judgment Pronounced on: 27.03.2019

W.P.(C) 8089/2017

MR. JUSTICE S. RAVINDRA BHAT

1. The writ petitioner (hereafter "Eveready") questions the decision of the second respondent (the Designated Authority hereafter "DA") in a notification dated 27.09.2016 ("Impugned Final Findings"), recommending against the imposition of anti-dumping duties on imports of AA Dry Cell

Batteries (the "subject goods" hereafter), originating in or exported from the People's Republic of China and Vietnam (hereafter variously "subject country", and "subject countries").

2. Eveready is a domestic manufacturer of the subject goods and a member of the domestic industry on whose behalf the application for initiation of anti-dumping investigations was filed. The first respondent (Union Department of Revenue, Ministry of Finance hereafter "the Union"

or "the Central Government"), determines whether or not to accept the recommendations of the DA. The Central Government may, within three months of the date of publication of final findings by the Designated Authority, impose by notification in the Official Gazette, anti-dumping duty on the goods originating in or exported from the countries in respect of which suspected dumping activities are confirmed by the DA. The latter (DA) carries out anti-dumping investigations and recommends whether or not to impose anti-dumping duties to the Central Government. It has, in the present case, issued the impugned final findings. The third respondent is Godrej & Boyce Mfg. Co. Ltd (hereafter "Godrej") an interested party in the anti-dumping investigations, who was impleaded in the present proceedings through C.M. No. 39592 of 2017.

Brief Facts

3. The facts, in brief, are that in 2015, the Association of Indian Dry Cell Manufacturers filed an application for initiation of anti-dumping investigation of imports of the subject goods, originating in or exported from

the subject countries. This Application was filed before the DA, for and on behalf of the domestic industry comprising of Eveready, M/s. Panasonic Energy India Ltd., and Nippo Batteries Company Ltd. On 20.10.2015, the DA, on a prima facie determination that sufficient evidence of dumping of the Subject Goods existed, issued an initiation notification in terms of Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ("Rules") to determine the existence, degree and effect of the alleged dumping. 01.04.2014 to 31.03.2015 was chosen as the period of investigation. Copies of the initiation notification were sent to the Embassies of the subject countries in India, known exporters, importers and other interested parties. Barring Godrej none of the exporters/producers or importers filed questionnaire responses or any submissions during the course of the investigation. On 03.02.2016, all interested parties were invited to present their views in a public hearing, in accordance with Rule 6(6) of the Rules. However, none of the interested parties, except members of the domestic industry, attended the public hearing.

4. On 18.08.2016, DA issued to interested parties a Disclosure Statement which, inter alia, contained the essential facts of the investigation, inviting comments on the same. The Petitioner argues since the essential facts disclosed in the disclosure statement clearly established dumping, injury and causal link, it merely reiterated its earlier submission and asked for a confirmation of the essential facts and reasoning disclosed. Thereafter, on 27.09.2016, DA issued the impugned final findings which recommended against the imposition of anti-dumping duty, concluding as follows:

"Having initiated and conducted the present investigation in dumping, injury and causal link in terms of the Anti dumping Rules, the Authority is of the view that the dumped imports have not caused material injury to the domestic industry in view of the facts that the domestic industry has realized much higher selling price as compared to their non-injurious price and also the landed price of the subject goods from the subject countries and earned huge profits. Having concluded as above, the Authority is of the view that imposition of antidumping duty, on the imports of the subject goods, originating in or exported from the subject countries, is not required."

5. Following this, no Gazette Notification imposing anti-dumping duty was issued by the Union.

6. On 01.11.2016, the Petitioner filed a representation before Respondent No. l. However, the Union, in its reply to an RTI application dated 23.12.2016, stated that:

"In the instant case the DGAD has not recommended imposition of Anti-Dumping duty on imports of AA Dry Cell Batteries originating in or exported from China PR and Vietnam. As there is no further action lying at our end the final findings of the DGAD are put up for perusal and information please."

7. The Petitioner then challenged the impugned final findings before the Customs, Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi ("CESTAT" or "Appellate Tribunal"), under Section 9C of the Customs Tariff Act, 1975 ("Customs Tariff Act"). The Appellate Tribunal,by Order dated 20.07.2017("Impugned Order"), dismissed the appeal, stating that:

―... there is no determination of ADD levy by notification as published in the official gazette by the Central Government under Rule 18 and, as such, the appeals under Section 9C in the present case are not maintainable.‖

8. The Petitioner thus filed the present petition, claiming that the impugned final findings be quashed and the matter, remanded back for fresh decision to DA. On 20.09.2018, however, a Division Bench of the Delhi High Court, in Jindal Polyfilm Ltd. v. Designated Authority &Anr., W.P (C) No. 8202/2017, appears to have expansively interpreted the scope of appeal under Section 9C of the Customs Tariff Act. Placing reliance on this judgment, the Petitioner has now filed an application under Section151 of the Civil Procedure Code, 1908, praying that the CESTAT's Impugned Order be set aside and the matter be remitted back before the Appellate Tribunal.

9. It is argued on behalf of the petitioner, by learned senior counsel Mr. Basavaprabhu Patil that the DA recorded a positive disclosure statement and contradictory to it, rendered negative final findings in complete departure. He relies on Rule 16 of Anti-Dumping Rules to say that the DA has to inform all interested parties of the essential facts under consideration which would form the basis for its decision. The Disclosure Statement is issued before notifying the final findings and is almost a decision of the Designated Authority with regard to various essential facts and parameters involved in deciding the issues before it. It is submitted that in the present case the disclosure statement had clearly concluded that the domestic industry had suffered material injury as a result of dumped imports in the Country. The DA, however, in the final findings concluded that the domestic industry did not suffer material injury. The DA gave different conclusions in disclosure statement and final finding. It is relevant to note in this regard that these different conclusions drawn by Designated Authority after issuance of Disclosure Statement are without any change whatsoever in the underlined factual position.

10. It is argued that the vital conclusions in the disclosure statement were that :

i) Imports of the product under consideration from the subject countries were low until 2013-14 in view of the anti-dumping duty in place on subject goods from China PR. However, with the cessation of the anti-dumping duty in May 2013, the imports increased significantly in the current Period of Investigation and caused injury to the domestic industry as established from the detailed analysis in the disclosure statement.

ii) Demand for the product under consideration has increased during the POI. However, despite increase in demand, the $hare of the domestic industry in the domestic market has substantially declined while the share of the imports from the subject country has significantly increased. (para 43)

iii) Capacity utilization of the domestic industry over the injury period declined despite increase in demand, in the face of increase in imports from the subject countries. Production of the domestic industry has increased up to 2013-14, but declined in the POI, whereas demand during the same period has increased significantly. (para 48)

iv) Inventory level of the domestic industry has increased. (para 58)

v) Presence of dumped imports has resulted in decline in capacity utilization, production and sales, despite increase in demand. (para 79)

vi) Imports are undercutting the prices of the domestic industry. Import price is much lower than the level of cost of production of the domestic industry preventing increase in selling price of the domestic industry. (para 50)

vii) Domestic industry has suffered significant price underselling during the investigation period on account of imports of the subject goods from the subject countries. (para 53)

11. It is submitted that on the other hand, crucial and contradictory conclusions in the final findings in respect of material injury are opposite to what was reflected in the disclosure statement

a. There is dumping of the product concerned from China PR and Vietnam.

b. Such dumping margin and injury margin are positive with positive undercutting.

c. Despite dumping, huge amount of profit is made by the domestic industry with significantly high ROCE position.

d. Net sales realization of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore, no price impact on the domestic industry was noticeable.

e. Though a huge volume of subject goods entered the Indian market during the POI; there is marginal decline in sales of the domestic industry and they do not appear to have had any injurious effect on the domestic industry in terms of price parameters since their net sales realization is much more than the landed value, and profit position is phenomenal.

f. Consequently, the dumped imports from China PR and Vietnam cannot be dubbed as causing material injury to the domestic industry. Since the domestic industry is able to sale at prices higher than the landed prices and still make huge profits, the huge volume of imports may not cause much injury to the domestic industry.

12. It is also submitted that there is complete contradiction in the conclusions of the DA between the final findings and the previous disclosure statement. Besides, there were new facts in the final findings, not shown in the disclosure statement. These were that the DA for the first time made following statements in the final findings. (a) Despite demand in the domestic market more than its capacity, it neither increased its production in line with demand, nor increased its sales in the domestic market matching with its production. This indicates that the domestic industry is not willing to sell its goods in the domestic market despite getting a better price than the landed price from the subject countries. Or it may be due to lack of wide spread marketing network by the domestic industry. (b) the DA noted that the landed price of imports is below the selling price of the domestic industry, resulting in price undercutting. This may be due to the fact that majority of the imports from the subject countries, especially from China, are low value products. (c) The threat of injury was not substantiated by information provided by the domestic industry pertaining to the injury period and the POI of the present investigation. (d) Despite dumping, huge amount of profit is made by the domestic industry with significantly high ROCE position. (e)The landed value of imports is lower than the selling price of the domestic industry. Therefore, Indian price cannot be interpreted as attractive for exports by the subject countries. (f) Net sales realization of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore there was no price impact on the domestic industry. (g) Since the domestic industry is able to sell at prices higher than the landed prices and still then make huge profits, the huge volume of imports may not cause much injury to the domestic industry. (h) The level of inventory with the domestic industry has increased during the POI. This is the situation despite getting a higher price vis-a-vis the imports and increasing demand. Perhaps, the domestic industry should focus more on expanding and strengthening its sales network to penetrate more in to the rural areas. (i) The domestic industry failed to place sufficient evidence to establish that increased imports would adversely impact them.

13. It is argued that the Designated Authority found in the disclosure statement that there was significant increase in import posing threat of injury (ii) Price attractiveness of Indian Market. It is likely that the subject countries' import shall further aggressively target and take over the entire Indian demand in a nearly foreseeable future (iii) excess production capacities in subject countries based on the earlier finding to prove that China does have a much larger manufacturing base for the subject goods as compared to India and generate huge production and exportable surplus capable of overtaking the entire Indian market. (iv) Export orientation of producers and exporters in subject· countries based on the earlier finding that Chinese economy is well-known for its export orientation. Considering the demand in India and the import trends during the POI vis-a-vis earlier years, especially after the revocation of the earlier duties, further spurt in exports at dumped prices cannot be ruled out. (v) Inventories had increased with domestic industry in alarming proportions during the POI despite increase in demand in the domestic market. However, Designated Authority discarded its earlier conclusion on threat of material injury and held that no substantiated information was provided by the domestic industry pertaining to the injury period and the POI of the present investigation. The Domestic industry was kept in dark while relying on earlier finding which, rather prove its case of the domestic industry. The domestic industry was never asked to provide information pertaining to injury period and the POI of the present investigation. The DA should have sought such information or would have disclosed this fact in the disclosure statement.

14. It is further pointed out that the DA concluded erroneously that the domestic industry made huge profits. The findings concluded that despite dumping, ―huge amount of profit is made by the domestic industry with significantly high ROCE position. " The petitioners rely on a table to show that the return on investments earned by the domestic industry over the POI to say that the DA granted 22% return on capital employed for the purpose of determination of NIP and Designated Authority has repeatedly held that this 22% return on capital employed represents reasonable return. The factual basis for stating that the domestic industry has earned huge profits, is contested and it is submitted that the ROI of the domestic industry is below 22%. On one hand the DA considered consistently in more than 500 investigations that 22% return on capital employed is reasonable and is required to be considered in order to determine NIP of the domestic industry, the DA has determined NIP considering 22% return on capital employed, on the other hand, the DA has now held that the domestic industry had earned huge profits.

15. Learned counsel states that the DA in a large number of investigations held that the comparison of NIP with NSR is irrelevant. The DA consistently held that the purpose of NIP determination is limited to the determination of injury margin and the mere fact that the NSR is above NIP is of no relevance. The DA even argued this position before CESTAT in the matter of All India Glass Manufacturers Federation v Union of India/Designated Authority, in support of the final findings notified by the Designated Authority in that case wherein the Designated Authority recommended imposition of anti-dumping duties despite the fact that the NIP was below NSR. CESTAT, by its final order dated 06.09.2016 held that there is no legal provision to mandate the DA to compare NIP (non injurious price) with NSR (net sales realization) in order to determine the price effect and upheld the final finding. However, DA now in paragraph 64 of the final finding held as under: ―Net sales realization of the domestic industry is more than th landed price and also the non-injurious price of the domestic industry. Therefore no price impact on the domestic industry.

16. It is urged that Paragraph (ii) of Annexure-11 of Anti-dumping Rules provides that when examining the volume of dumped imports, the said authority shall consider whether there has been a significant increase in the dumped imports, whether in absolute terms or relative to production or consumption in India. With regard to the effect of the dumped imports on prices as referred to in sub-rule (2) of rule 18 the designated authority shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of like product in India, or

whether the effect of such imports is otherwise to depress prices to a significant degree prevent price increase which otherwise would have occurred, to a significant degree.

17. It is submitted that three elements have been provided in the relevant provision to examine price effect (i) price undercutting (ii) price depression and (iii) price suppression. There is no requirement that all these parameters should individually show price effect. Even one element is sufficient to prove price effect. Further and in any case, NIP comparison with NSR has not been prescribed as a parameter under Annexure-11. In fact, this comparison cannot be relevant for the simple reasons that (a) Indian Rules are consistent with WTO Agreement, (b) NIP determination is peculiar to only India, whereas the WTO provision exists in all WTO member countries practicing this law. If other Investigating Authorities are making determination without NIP law, it is only because NIP comparison with NSR is entirely immaterial. More importantly, the final findings is contradictory on this account because DA at one place found price effect, and held otherwise at other place. Relevant part of the final findings are as follows:

―Para 53 - From the above information, the Authority notes that the landed price of imports (including basic customs duty) is below the selling price of the domestic industry, resulting in price undercutting. This may be due to the fact that majority of the imports from the subject countries, especially from China, are low valve products. 54. It is noted that the price underselling effect of the dumped imports from China PR is significant. This may be again due to the fact that majority of the imports from the subject countries, especially from China, are low value products...

18. It is argued that the DA failed to consider its own position taken in.another case and its own arguments before the Tribunal, that too just few days before the decision in that case. This is a clear case of contradictory and discriminatory approach. The Designated Authority ignored its past established precedents where it held that NIP being below NSR does not imply that there is no justification in imposition of anti-dumping duties.

19. It is argued that this court has the power and jurisdiction to intervene and correct the impugned findings, considering that the DA acts in a quasi- judicial capacity. In the event the court were to hold that the DA overstepped the bounds of law, or rendered perverse findings, Article 226 is an effective remedy. The petitioners relied on several judgments, to say that the DA performs quasi-judicial functions though its recommendations are not binding on the UOI.

20. It is argued on behalf of the Central Government that this court should not entertain the writ petition. Learned counsel relied on the final findings of the DA and urged that the scheme of the Rules governing conduct of the proceeding, obliged that authority to hear the parties, and issue a disclosure statement. However, post disclosure statement, there is scope for a further hearing by the parties; the DA is bound by law, within the time prescribed, to report its final findings which are in the form of recommendations. These recommendations are not binding upon the Central Government; it has the widest range of choices to accept them, or impose duty according to its discretion, which may be limited in terms of time, or any other consideration.

21. It is submitted that though the DA's proceeding is quasi-judicial, its findings are not; it is only when those findings are acted upon, that the duty imposed becomes the occasion for a challenge. On the merits, it is urged that the DA considered all the relevant factors and applied the rules framed in this regard under the Customs Tariff Act, to conclude that though there was dumping, there was no injurious effect. The respondent also stated that according to the DA's report, the domestic industry had not utilized its capacities, despite increase in demand. It was lastly urged that a disclosure statement does not in any manner create a vested right that the final findings should be according to what is disclosed; even that statement is not appealable inasmuch as it is a step, an aid in the final process of decision making.

Findings of the Designated Authority

22. The relevant extracts of the DA's findings in this case are extracted below:

―...The Authority notes that demand for the product under consideration has marginally increased during the POI as compared to the base year. While the domestic industry holds significant share in the market throughout the injury period including the POI, the rest of the suppliers including the subject countries contribute to the market minimally. From the aforesaid data, the only concern appear to be the increase of the market share of the subject countries from1.23% in the base year to 12.87% in the POI, whereas the market share of the domestic industry has declined from 89.87% during the base year to 82.97%during the POI. But, this trend needs to be analyzed with reference to the production capacity of the domestic industry and their actual production during the injury period including the POI. As per the information given in the relevant Para of this finding, the domestic industry has increased its production capacity throughout the injury period. It increased its production capacity from 2150400 thousand pcs in the base year to 2418400 thousand pcs in the POI. Bit, despite demand in the domestic market more than its capacity, it neither increased its production in line with demand, nor increased its sales in the domestic market matching with its production. This indicates that the domestic industry is not willing to sale its goods in the domestic market despite getting a better price than the landed price from the subject countries. Or, it may be due to lack of widespread marketing network by the domestic industry.

Import Volume and Market Share:

46. With regard to volume of the dumped imports, the Authority is required to consider whether there has been a significant increase in dumped imports either in absolute terms or relative to production or consumption in India. Annexure II(ii) of the anti-dumping rules provides as under: ―While examining the volume of dumped imports, the said authority shall consider whether there has been significant increase in the dumped imports either in absolute terms or relative in production or consumption in India.

47. The import volumes for the injury period, considering the transaction wise data is as under:

Particulars	*UOM*	*2011-12*	*2012-2013*	*POI 13*	*14*
Import Volume					
China	*_000 Pcs*	*20,132*	*35,918*	*41,643*	*194,407*
Trend	*Indexed*	*100*	*178*	*207*	*966*
Vietnam	*_000 Pcs*	*5,500*	*7,004*	*5,913*	*83,420*
Trend	*Indexed*	*100*	*127*	*108*	*1,517*
Subject countries	*_000 Pcs*	*25,632*	*42,922*	*47,555*	*277,826*
Trend	*Indexed*	*100*	*167*	*186*	*1,084*
Other countries	*_000 Pcs*	*94,315*	*33,342*	*10,930*	*843*
Trend	*Indexed*	*100*	*35*	*12*	*1*
Total imports	*_000 Pcs*	*119,947*	*76,263*	*58,486*	*278,670*
Trend	*Indexed*	*100*	*64*	*49*	*232*
Market Share					
China	*%*	*16.78*	*47.10*	*71.20*	*69.76*
Vietnam	*%*	*4.59*	*9.18*	*10.11*	*29.93*
Subject Countries	*%*	*21.37*	*56.28*	*81.31*	*99.70*
Other Countries	*%*	*78.63*	*43.72*	*18.69*	*0.30*
Total	*%*	*100.00*	*100.00*	*100.00*	*100.00*

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Capacity, Production, Capacity, utilization and Sales Volume

50. As noted from the table below, there is an enhancement of capacity of the domestic industry in the period 2012-13 and 2013-14 in line with increase in demand, put during POI, the domestic industry abstained from increasing its capacity further despite increasing demand. Production of the domestic industry has increased up to 2013-14, but declined in the POI, whereas demand during the same period has increased significantly. This is the situation despite the domestic industry realising a better price than the landed price.

Particulars	*UOM*	*2011-12*	*2012-13*	*2013-14*	*POI*
Installed	*000 Pcs*	*21,50,400*	*23,09,400*	*24,18,400*	*24,18,400*

Capacity					
Trend	*Indexed*	*100*	*107*	*112*	*112*
Production	*000 Pcs*	*18,12,289*	*18,70,943*	*18,92,327*	*18,49,807*
Trend	*Indexed*	*100*	*103*	*104*	*102*
Capacity Utilization	*%*	*84.28%*	*81.01%*	*78.25%*	*76.49%*
Trend	*Indexed*	*100*	*96*	*93*	*91*
Domestic Sales	*000 Pcs*	*17,89,225*	*17,78,384*	*18,27,803*	*17,82,890*
Trend	*Indexed*	*100*	*99*	*102*	*100*
Demand	*000 Pcs*	*20,79,040*	*20,21,551*	*20,13,593*	*21,79,064*
Trend	*Indexed*	*100*	*97*	*97*	*105*

PRICE EFFECT

Price effect of dumped imports and impact on domestic industry

51. The impact on the prices of the domestic industry on account of imports of the subject goods from the subject country have been examined with reference to price undercutting, price underselling, price suppression and price depression. For the purpose of this analysis, the cost of production, net sales realization (NSR) and the non-injurious price (NIP) of the domestic industry have been compared with landed value of imports from the subject country. A comparison for subject goods during the period of investigation was made between the landed value of the dumped imports and the domestic selling price in the domestic market. In determining the net sales realization of the domestic industry, taxes, rebates, discounts and commission incurred by the domestic industry have been adjusted. The price underselling is an important indicator of assessment of injury; thus, the Authority has worked out a non-injurious price and compared the same with the landed value of imports to arrive at the extent of price underselling. The non-injurious price has been evaluated for the domestic industry in terms of Annexure Ill of the Anti- Dumping Rules. The position is as follows:

Price Undercutting

52. Price undercutting has been assessed by comparing the landed value with the domestic selling price in India of the subject goods during the injury period as follows:

Particulars		*Unit*	*2011-12*	*2012-13*	*2013-14*	*POI*
China PR	*Landed price of imports*	*Rs./'000Pcs*	*2,869*	*3,012*	*1,115*	*1,007*
	Net Sales	*Rs./'000Pcs*	*****	*****	*****	*****
	Realisation Price	*Rs./'000Pcs*	*****	*****	*****	*****
	Undercutting Price	*%*	*****	*****	*****	*****
	Undercutting Price	*% Range*	*10-20*	*5-10*	*210-220*	*310-320*

Undercutting Vietnam

Landed price Rs./'000Pcs 2,305 2,396 2,770 2,739

of imports

Net Sales Rs./'000Pcs *** *** *** ***

Realisation

Price Rs./'000Pcs *** *** *** ***

Undercutting Price % *** *** *** ***

Undercutting Price % Range 30-40 30-40 20-30 50-60

Undercutting Subject countries as a whole

Landed price Rs./'000Pcs 2,606 2,912 1,321 1,527

of imports Net Sales Rs./'000Pcs *** *** *** ***

Realisation

Price Rs./'000Pcs *** *** *** ***

Undercutting

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Magnitude of dumping

61. The Authority notes that the dumping margin of the imports from subject countries is more than de-minimus and substantial. Growth

62. The Authority notes that the domestic industry has shown negative growth in terms of production and sales. However, profit has shown significant improvement.

Growth	*UOM*	*2011-12*	*2012-13*	*2013-14*	*POI*
Production	*%*	*-*	*3.24*	*1.14*	*-2.25*
Domestic Sales	*%*	*-*	*-0.61*	*2.78*	*-2.46*
Selling Price	*%*	*-*	*3.43*	*9.85*	*18.29*
Cost of Sales	*%*	*-*	*3.32*	*2.53*	*9.62*
Profit/Loss	*%*	*-*	*0.09*	*235.29*	*238.54*

Conclusion on Injury

64. Having regard to the contentions raised, information provided and submissions made by the interested parties and facts available before the Authority as recorded in this finding and on the basis of the above analysis of the state of dumping and consequent injury, the Authority concludes that: i. There is dumping of the product concerned from China PR and Vietnam. ii. Both dumping margin and injury margin are positive with positive undercutting. iii. Despite dumping, huge amount of profit is made by the domestic industry with significantly high ROCE position. iv. Net sales realisation of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore no price impact on the domestic industry. v. Although huge volume of subject goods have entered Indian market during the POI, there is marginal decline in sales of the domestic industry and they do not appear to have had any injurious effect on the domestic industry in terms of price parameters since their net sales realization is much more than the landed value and profit position is phenomenal. vi. Therefore, the dumped imports from China PR and Vietnam cannot be dubbed as causing material injury to the domestic industry. Since the domestic industry is able to sale at prices higher than the landed prices and still then make huge profits, the huge volume of imports may not cause much injury to the domestic industry. vii. Therefore, the 'Authority concludes that the domestic industry did not suffer material injury during the POI.

H. THREAT OF MATERIAL INJURY

65. The Authority examined whether the imports are threatening material injury to the domestic industry. Rules provide as follows with regard to threat of material injury- A determination of a threat of (vii) material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the designated authority shall consider, inter alia, such factors as: (a) significant rate of increase of dumped imports into India indicating the likelihood of substantially increased importation;(b) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to Indian markets, taking into account the availability of other export markets to absorb any additional exports; (c) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and (d) inventories of the article being investigated.

(b) Excess Production Capacities in the subject country:-

68. On the basis of information provided by the domestic industry, in the earlier sunset review final findings issued on 20th May, 2013, at Para 66, the Authority had held as follows:"66. The domestic industry in its submissions has claimed that the producers in China are having significant surplus capacities as compared to the demand of subject goods in the domestic market. Domestic industry submitted that there are over 100 producers of Dry Cell Batteries in China. However, the below table data for 20 major producers of subject goods for which data is available. As per information furnished by the Domestic Industry, around 47.12% of the production represents the share of production of AA batteries (subject goods). Based on the same the table below shows the production, consumption and exports of the product under consideration:

SN	*Particular*	*2009*	*2010*
1	*Installed Capacity in Million Pcs*	*18,090*	*18,090*
2	*Subject goods volume (AA share of Total Capacity is 47.12%) in Million Pcs*	*8,524*	*8,524*
3	*Production in China in Million Pcs*	*5,527*	*6,435*

4	*Global Export in Million Pcs*	*2,545*	*2,846*
5	*Consumption in China in Million Pcs (5- 4)*	*2,982*	*3,589*
6	*Unutilised Capacity in Million Pcs (2- 3)*	*2,997*	*2,089*
7	*Surplus as % of Production*	*54%*	*32%*
8	*Surplus as % of Domestic Demand*	*101%*	*58%*
9	*Surplus as % of Global Export*	*118%*	*73%*
10	*Freely disposable production capacity (unutilized capacity + current exports) in Million Pcs*	*8,072*	*9,281*
11	*Indian Demand (Annualised POI) in Million Pcs*	*1,793*	*1,793*
12	*Freely disposable production capacity as % of Indian Demand*	*450%*	*518%*

J. Post Disclosure Comments

76. Post disclosure, none of the interested parties made any submission/comment.

77. The following post disclosure comments/submissions have been made by the domestic industry:

i. The non-injurious price (NIP) determined by the authority is too low and inadequate to protect the domestic industry. ii. While determining NIP, the authority should consider the actual raw materials and utilities consumption. iii. It is inappropriate to ignore the actual production and adopt any other production basis for determination of NIP. iv. The domestic industry is offering product of different varieties and types with different price ranges. Similarly, the Chinese batteries are also being sold in the market at different price ranges. Therefore, the prices of the domestic industry are quite comparable with the retail prices of Chinese batteries. v. The traders are cornering the entire profit on account of dumped Chinese batteries and the consumers obtain the batteries at the same price as offered by the domestic industry. vi. Petitioners request the authority to recommend benchmark form of duties in the present case since the product was earlier attracting benchmark form of duty. Moreover, while the he imports have been reported at significantly different prices, costs of production do not have significant variations. Therefore, it would be appropriate to have benchmark form of duty. vii. The duty should be imposed in terms of US$.

RECOMMENDATIONS

79. The Authority notes that the investigation was initiated and notified to all interested parties and adequate opportunity was given to the exporters, importers and other interested parties to provide positive information on the aspect of dumping, injury and causal link. Having initiated and conducted the present investigation into dumping, injury and causal link in terms of the Antidumping Rules, the Authority is of the view that the dumped imports have not caused material injury to the domestic industry in view of the facts that the domestic industry has realized much higher selling price as compared to their non-injurious price and also the landed price of the subject goods from the subject countries and earned huge profits. Having concluded as above, the Authority is of the view that imposition of anti-dumping duty, on the imports of the subject goods, originating in or exported from the subject countries, is not required.

Relevant Provisions

The relevant provisions of the Customs Tariff Act, 1975 are extracted below:

"Section 9A. Anti- dumping duty on dumped articles. -- (1) Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

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(5) The antidumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition: Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension: Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the antidumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.
********** ********

Section 9C. Appeal. -- (1) An appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellate Tribunal).

Relevant provisions of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

—4. Duties of the designated authority. - (1) It shall be the duty of the designated authority in accordance with these rules: ...

to recommend the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, and the date of commencement of such duty; and..

10. Determination of normal value, export price and margin of dumping. - An article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances the designated authority shall determine the normal value, export price and the margin of dumping taking into account, inter alia, the principles laid down in Annexure I to these rules.

11. Determination of injury. -(1) In the case of imports from specified countries, the designated authority shall record a further finding that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

(2) The designated authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure II to these rules.

(3) The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if-

(i) there is a concentration of dumped imports into an isolated market, and

(ii) the dumped articles are causing injury to the producers of all or almost all of the production within such market.

12. Preliminary findings. - (1) The designated authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record a preliminary finding regarding export price, normal value and margin of dumping, and in respect of imports from specified countries, it shall also record a further finding regarding injury to the domestic industry and such finding shall contain sufficiently detailed information for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. It will also contain:-

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the article which is sufficient for customs purposes;

(iii)the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

(2) The designated authority shall issue a public notice recording its preliminary findings.

24. It is also necessary at this stage to notice and extract the relevant provisions of the General Agreement on Tariffs and Trade, 1994, to which India is a signatory:

"Article 6 ......

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

....

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings 11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.(21) Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3. Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.‖ (emphasis added)

Analysis and Conclusion

25. The issue arising for consideration in the present case is whether the Designated Authority's negative Final findings recommending no anti dumping duty on the ground of it not being in accord with the disclosure statement published by it, can in the circumstances of this case, be interfered with in judicial review.

26. Supreme Court judgments, and several decisions of High Courts, have clarified that the Designated Authority is only an investigating authority whose findings are recommendatory in nature. It is only when the recommendation is followed by a notification imposing anti dumping duty that a lis arises; this appears to be clear from the three judge decision in Tata Chemicals v Union of India 2008 (17) SCC 180. No doubt, every DA adopts and is duty bound to adopt (in consonance with GATT provisions as well as the rules) a quasi-judicial procedure, whereby opportunity is granted to the concerned parties and those likely to be affected, culminating in reasoned final findings. This aspect has been highlighted by the Supreme Court in Automotive Tyre Manufacturers Association v. the Designated Authority &Ors (2011) 2 SCC 258. The Supreme Court held that the DA exercises quasi- judicial functions and is bound to act judicially. The DA determines the rights and obligations of the "interested parties" by applying objective standards based on the material/information/evidence presented by the exporters, foreign producers and other "interested parties" by applying the procedure and principles laid down in the 1995 Rules. While determining the existence, degree and effect of the alleged dumping, the Designated Authority determines a "lis" between persons supporting the levy of duty and those opposing the said levy.

27. Rule 10 of the said Rules prescribes the criteria for the determination of the normal value, export price and margin of dumping, while Rule 11 deals with the determination of injury which according to Annexure II to the 1995 Rules is based on positive evidence and involves an objective examination of both: (a) the volume and the effect of the dumped imports on prices in the domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products. It is evident that the determination of injury is premised on an objective examination of the material submitted by the parties. Moreover, under Rule 6(7) of the 1995 Rules, the DA is required to make available the evidence presented to it by one party to other interested parties, participating in the investigation. The court also held that the DA is obliged to adhere to the Rules while conducting investigations and is duty bound to follow the principles of natural justice in the exercise of power conferred on it; the DA also has to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter.

28. A Division Bench of this Court, in Deepak Fertilizers v. Designated Authority, 2006 SCC OnLine Del 38, after noticing Rule 3 of the Rules further clarified that the Designated Authority only assists the Central Government in making its determination. According to Rule 4(1) (d) of the Rules, the duty of the Designated Authority is to recommend the amount of anti-dumping duty, which if levied, would remove the injury to the domestic industry. Section 9A of the Customs Tariff Act enables only the Central Government to impose anti-dumping duty. The Customs Tariff Act and the Rules thereunder thus make it clear that the Designated Authority's findings are mere recommendations intended to assist the Central Government. Reference, in this regard, may also be made to the CEGAT's decision in Indian Spinners Association v. Designated Authority, 2000 (119) ELT 299 (Tri. - Delhi).

29. The report of the Designated Authority is only a recommendation, it does not create any rights or liabilities and is therefore not binding on the Central Government. A bare reading of the Customs Tariff Act and its Rules reveals this. Section 9A(1) of the Customs Tariff Act, which empowers the Central Government to impose anti-dumping duty, reads as follows:

―Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.‖ (emphasis added)

30. Rule 18(1), describes the process in further detail:

―18. (1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.7.‖ (emphasis added)

31. The use of the word "may" and not "shall", in both the Act as well as the Rules, sufficiently evidences the legislature's intention to allow the Central Government to disagree with the Designated Authority's recommendation.

32. In Alembic Ltd. v. Union of India, 2013 (291) ELT 327 (Guj.), for instance, the Central Government, after taking note of relevant factors, decided that it would not be in public interest to impose anti-dumping duty, despite the recommendations made by the Designated Authority. The Court was of the opinion that the Designated Authority, under Rule 3,acts for and on behalf of the Government, to determine the existence, degree and effect of any alleged dumping and that in that view of the matter, its findings with respect to such issues may not be open to question by the Central Government. However, the Court clarified, this did not mean that even the recommendations of the Designated Authority are binding on the Central Government. In explaining its rationale, the court reasoned as follows:

—We are conscious that DA had come to certain conclusions which were not disputed by the Central Government. Insofar as factual findings are concerned, such findings were perhaps not even open to challenge by the Central Government. ...

However, in the present case, we are of the opinion that the Central Government has taken into consideration various factors and come to the conclusion that it is not in public interest to impose Anti-dumping duty. Such factors are additional and besides those taken into account by DA for recommending Anti-dumping duty. As noted earlier, task of DA is limited of ascertainment of various factors such as factum of dumping if at all, ascertainment of extent of dumping, injury to the domestic market and amount of dumping duty [that] in his opinion would eliminate injury. These are issues which necessarily would be governed by material that may be brought on record and ascertainment of relevant factors on basis of facts presented. DA while examining these issues would not be involved in ascertaining other consequences of imposition or otherwise of Anti-dumping duty. It is necessarily the task of the Central Government to ascertain such factors and to come to conclusion whether despite such recommendations, Anti- dumping duty should be imposed or not.

33. This court is conscious of the separate roles that the Designated Authority and the Central Government perform in deciding whether or not to impose anti-dumping duty. The Central Government is restricted from imposing anti-dumping duty in certain circumstances. One such circumstance is outlined in Section 9B (1)(b)(ii) of the Act. Section 9B(1)(b)(ii) prevents the Central Government from levying anti-dumping duty on any article imported into India from a member of the World Trade Organisation (WTO) or from a most favoured nation, unless a determination has been made that import of such article causes or threatens material injury to any established industry in India. The relevant portion of Section 9B is extracted below for ready reference:

—Section 9B. No levy under section 9 or section 9A in certain cases. -- (1) Notwithstanding anything contained in section 9 or section 9A, -...

the Central Government shall not levy any countervailing duty or antidumping duty –

(ii) under sub-section (1) of each of these sections, on the import into India of any article from a member country of the World Trade Organisation or from a country with whom Government of India has a most favoured nation agreement (hereinafter referred as a specified country), unless in accordance with the rules made under sub-section (2) of this section, a determination has been made that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India;

34. The Andhra Pradesh High Court, in Vuppalamritha Magnetic Components Limited v. Union of India 2010 (256) ELT 487 (A.P.), has interpreted this section as requiring the Central Government to decide regarding material injury. The Designated Authority is not made mention of. The Central Government is thus found to be at liberty to impose anti- dumping duty, even in the absence of a positive finding by the Designated Authority.

35. The combined effect of the statutory provisions contained in the Act and the rules shows that the DA - under Rule 3 of acts for and on behalf of the Government while carrying out the investigation to determine the existence, degree and effect of the alleged dumping. In that view of the matter, the findings of the designated authority with respect to such issues may not be open to question by the Central Government. In the opinion of this court, when it is not open to the Central Government to question the final findings recorded by the designated authority - on account of a negative recommendation to it by the statutorily designated expert body, not to exercise the sovereign power of imposing tax, the body of individuals and entities who are likely to be affected (and were issued notice of a possible adverse report, such as foreign exporters and domestic importers of such products from foreign origin) the standard of review, under Article 226 has to be of a different order.

36. Section 9A(5) of the Customs Tariff Act is modeled after Article 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. India, having acceded to the World Trade Organization with effect from 1995 was required to align its laws relating to countervailing duty and anti-dumping duty with the results of the Uruguay Round of Multilateral Trade Negotiations. Therefore, on 31.12.1994, an Ordinance to amend the Customs Tariff Act, 1975 was promulgated by the President, which, inter alia, introduced Section 9A into the Customs Tariff Act.

37. To understand the rationale behind the 5-year period provided under Section 9A (5), reference must be made to Article 11.3 of the Anti-Dumping Agreement. Article 11.3 has been drafted in response to the practice of some countries who were levying anti-dumping duties indefinitely. According to Article 11.3, anti-dumping duties shall terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The temporal limitation of 5 years indicates the importance of reviewing the need for the continued imposition of anti-dumping duty.

38. In the present case, 01.04.2014 to 31.03.2015 was chosen as the period of investigation- initiated on 20.10.2015. By Rule 17 necessarily the DA had to furnish its report. On 27.09.2016, DA issued the Impugned Final Findings wherein it recommended against the imposition of anti-dumping duty. The proviso enables the Central Government, in the exercise of its discretion to extend that period by a maximum of six months. In the event that the DA had decided to impose anti-dumping duty, the Central Government, according to Rule 18(1) would be obligated to impose anti- dumping duty within three months of the Designated Authority's final finding. In case of an adverse finding, even the provisional duty (if imposed earlier) has to be revoked within forty-five days of publication of the final findings.

39. In the facts of the case, if the petitioners' contentions were to be accepted, the "window period" for the DA to have reconsidered the matter after judgment, under Article 226 would have been between 27.9.2016 and 20 April 2017. Even if, arguendo anti-dumping duty were justified, the matter would necessarily have to be remanded back before the DA for reconsideration. Anti-dumping duty will only be imposed once both the DA and the Central Government agree that it is warranted. However, as the period of investigation is from 01.04.2014 to 31.03.2015, all determinations will only concern this 12-month period.

40. On the merits of the decision, the court notices that the DA in this case, considered all the facts relevant for it to decide whether there was incidence of dumping of the subject goods. The DA noted that the domestic industry is offering product of different varieties and types with different price ranges. Similarly, the Chinese batteries are also being sold in the market at different price ranges. Therefore, the prices of the domestic industry were found to be comparable with the retail prices of Chinese batteries. Furthermore, the DA noted, on the aspect of injury that:

—i. There is dumping of the product concerned from China PR and Vietnam.

ii. Both dumping margin and injury margin are positive with positive undercutting.

iii. Despite dumping, huge amount of profit is made by the domestic industry with significantly high ROCE position.

iv. Net sales realisation of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore no price impact on the domestic industry.

v. Although huge volume of subject goods have entered Indian market during the POI, there is marginal decline in sales of the domestic industry and they do not appear to have had any injurious effect on the domestic industry in terms of price parameters since their net sales realization is much more than the landed value and profit position is phenomenal.

vi. Therefore, the dumped imports from China PR and Vietnam cannot be dubbed as causing material injury to the domestic industry. Since the domestic industry is able to sale at prices higher than the landed prices and still then make huge profits, the huge volume of imports may not cause much injury to the domestic industry.

vii. Therefore, the Authority concludes that the domestic industry did not suffer material injury during the POI.

41. This court also notices that significantly, the DA extracted portions of its previous determinations in the sunset review, concerning the immediately preceding period (prior to POI) and noted that domestic demand had not decreased; the share of domestic production had not significantly matched, - during the POI in the present case, though the capacity existed. Despite these factors, the domestic manufacturers recorded significant and substantial products, which led it to hold that despite existence of dumping, there was no injurious effect. The petitioners' submission was to counter the inference, but nothing on record was brought to show that such conclusions were unreasonable or perverse.

42. The court cannot don the mantle of an economic analyst to decide whether the DA adopted the correct approach; as long as the final findings addressed all the legal requirements, and considered the factors outlined in the rules (as the DA did in this case) without a showing of procedural irregularity or illegality, the court cannot interfere under Article 226 of the Constitution.

43. India's entry into the GATT system constitutes a multilateral bargain between sovereign nations, where by it and the others have guaranteed that each of them would not resort to protective tariff, unless agreed common principles are followed, whereby free trade impedes and stifles domestic industry by injurious trade practices such as undercutting and dumping by exporters. These principles of determining what constitutes dumping are embodied in GATT provisions, which in turn have been assimilated into the domestic law in the form of the Act and Rules. Any action of the court which tends to transgress the timelines for determination and imposition of duty is fraught; the infraction that may ensue - by way of a belated determination and imposition of duty for a past period, might have consequences far beyond the contemplation of the facts of a given case.

44. In view of the above findings, this court is of the opinion that there is no merit in this petition, which is accordingly dismissed. No costs.

Contship Container Lines Ltd. v. D.K. Lall

(2010) 4 SCC 256

T.S. Thakur, J.— These three cross-appeals arise out of an order passed by the National Consumer Disputes Redressal Commission, New Delhi (hereinafter referred to as "the National Commission") whereby it has dismissed the complaint filed by the respondent, Shri D.K. Lall, proprietor of M/s Lall Enterprises against respondent, National Insurance Company Ltd. while granting relief in part to the complainant against Contship Container Lines Ltd., the shipping company to whom the consignment in question was entrusted for delivery to the consignee in Barcelona, Spain. The facts giving rise to the controversy may be summarised as under.

2. M/s D.K. Lall Enterprises, a sole proprietary concern, claims to have received an order for export of iron furniture and iron handicraft items from M/s Natural Selection International, a Spanish purchaser of those items. A similar order for export of miniature paintings is also said to have been received by the said concern from M/s Pindikas, another concern located in Spain.

3. The case of M/s D.K. Lall Enterprises (hereinafter referred to as "the exporter") is that all the items meant for export in terms of the above orders were packed in 122 different cartons for shipment to the purchasers in Spain. According to the exporter while miniature paintings were packed in one carton meant for export to M/s Pindikas, the iron furniture items meant for export to M/s Natural Selection International were packed in 121 other cartons. These packages were, according to the exporter, checked and cleared by the Customs Authority at Jodhpur and finally stuffed in one simple container, for which purpose the exporter hired the services of M/s Samrat Shipping & Transport System (P) Ltd. through its local agent who forwarded the container to Bombay where it was put on board CMBT Himalaya, a vessel belonging to M/s Contship Container Lines Ltd., the appellant in CA No. 6232 of 2004. It is noteworthy that the exporter had obtained a marine cargo/inland transit insurance policy to cover the risks enumerated in the policy.

4. The case of the exporter is that the consignment reached Barcelona, Spain on 1-3-1997 and that while 121 cartons had been duly received by M/s Natural Selection International, one carton marked for M/s Pindikas comprising miniature paintings was not so delivered to the consignee. The claim for payment of compensation on account of the alleged deficiency of service having been denied by the shipping company as also by the Insurance Company the exporter filed OP No. 272 of 1997 before the National Consumer Disputes Redressal Commission, New Delhi, claiming compensation to the tune of Rs 39,23,225 representing the value of the miniature paintings with interest pendente lite and till realisation.

5. The respondents contested the claim made against them, inter alia, on the ground that the petitioner was not a consumer and that the case involved complicated questions of fact and law, which could not be determined in summary proceedings before the Consumer Commission. It was also alleged that the exporter had never stuffed/exported the carton containing miniature paintings and that the claim made by the exporter to that effect was false. Reference was made to the bill of lading according to which the particulars declared by the shipper/exporter had not been checked by the carrier.

6. It was also alleged that under Clause 17 of the bill of lading and Article IV Rule 5 of the Carriage of Goods by Sea Act, 1925 the liability of the carrier was limited to 2 SDRs per kg of weight, which came to 400 SDRs for the loss of the undelivered package weighing 200 kg equivalent to Rs 21,428 only. The respondents further alleged that the cartons had not been properly marked with the result that the same could not be segregated before being delivered to the consignee concerned.

7. The Insurance Company also filed a separate reply, alleging that the exporter was in collusion with the buyers trying to perpetrate a fraud on them with a view to making an undeserved and unjust financial gain. The Company alleged that the valuation indicated in the policy was c.i.f. + 10% whereas the invoice f.o.b. (free on board) and the bill of lading was clean. The Company asserted that the liability of the seller came to an end no sooner the consignment was loaded on to the ship leaving the exporter with no insurable interest in the consignment.

8. The Commission received three affidavits as evidence, one filed by the exporter, the second by the carrier while the third was filed by Mr Ramesh Goyal, Senior Branch Manager of the Insurance Company. By its order dated 14-7-2003 the Commission held that the insurance policy had been obtained on the representation that the transactions between the exporter and the purchasers were on c.i.f. basis whereas the consignment had in fact been sent on f.o.b. basis which absolved the Insurance Company of any liability for the failure of the insured to maintain utmost good faith essential for a marine insurance policy. The Commission noted that in the declaration of the consignment sent to the insured no details of the conditions of shipment were mentioned. There was thus, in the opinion of the Commission, absence of good faith on that account also.

9. The Commission further held that the policy covered risks only at sea and "that warehouse to warehouse" coverage was limited to risk arising from inland transit alone. The terms of the policy did not, according to the Commission, cover the risk till delivery was made to the consignee. The Commission on that basis held that there was no deficiency of service on the part of the Insurance Company.

10. Insofar as the claim against the carrier was concerned, the Commission recorded a finding that the service provided by them was deficient but held that the liability of the carrier for payment of compensation to the consignor was limited by the provisions of the Carriage of Goods by Sea Act, 1925. The Commission noted that since no value of goods was given in the bill of lading the only amount which the exporter was entitled to was a sum equivalent to $1800 in Indian rupees as per the then prevailing rate of exchange with interest @ 9% from 1-7-1998 till the date of payment with costs of Rs 10,000. The complaint, so far as M/s Samrat Shipping & Transport System (P) Ltd. was concerned, was dismissed on the ground that it was acting only as an agent of the carrier. A review petition filed against the said order by Mr D.K. Lall having been dismissed by the Commission by its order dated 29-10-2003, the appellants have filed the present appeals to assail the correctness of the orders passed by the Commission.

11. Two distinct issues fall for our consideration, one touching the liability of the Insurance Company and the other concerning the liability of the carrier.

12. On behalf of the Insurance Company a twofold submission was advanced before us. Firstly, it was contended that since the transaction between the exporter and the purchaser in Spain was on f.o.b. basis, the exporter had no insurable interest in the goods once the same were delivered to the carrier. It was argued that in a f.o.b. transaction the property in goods stands transferred to the purchaser no sooner the goods are entrusted to the carrier or at least when the same cross the customs barrier for shipment. This implies that all the risks relating to such goods are that of the purchaser who alone could sue the carrier or insurance company if there was an insurance cover obtained by him for such goods. The terms of the transaction between the shipper and the purchaser did not in the instant case reserve in favour of the shipper any right or interest in the goods so as to constitute an insurable interest within the meaning of Section 7 of the Marine Insurance Act, 1963.

13. Secondly, it was contended that a contract of insurance was based on utmost good faith not only by reason of the general principles governing such contracts but also by reason of Section 19 of the Marine Insurance Act, 1963. The shipper had not, however, observed utmost good faith while obtaining the insurance cover from the respondent Insurance Company inasmuch as the shipper had taken out an insurance policy from the Company on the representation that the goods were being dispatched on c.i.f. (cost, insurance and freight basis) while in reality the goods had been sent by the shipper on f.o.b. basis which constituted a material non-disclosure, hence failure of utmost good faith by him within the meaning of Section 19 of the Act aforementioned.

17. Section 7 of the Act stipulates that subject to the provisions of the Act every person interested in a marine adventure has an insurable interest. It reads:

"7. Insurable interest defined.—(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."

18. What is noteworthy is the use of the words "interested in a marine adventure" appearing in Section 7 of the Act. The expression "interested" has not been defined in the Act although sub-section (2) to Section 7 gives an indication of what would constitute "interest" in a marine adventure. The question is whether a seller of goods on f.o.b. basis like the complainant in the present case can be said to be "interested in marine adventure" within the meaning of Section 7. If the answer be in the affirmative, the complainant would have an insurable interest but not otherwise.

19. The provisions of the Marine Insurance Act, 1906 enacted by the British Parliament are in parimateria with those contained in the Indian Act. The former is in fact a precursor to the latter. The definition of "insurable interest" given in the English legislation is the same as the one given in Section 7 of our enactment. Judicial pronouncements by English courts would, therefore, be both relevant and helpful in understanding the true purport of the expression "insurable interest".

22. Dealing with the question whether the seller of goods retains any insurable interest, Halsbury explains (in Para 201):

"201. Seller and buyer.—… When, however, the property which is the subject-matter of the contract of sale has completely passed from the seller to the buyer, or when it has under the contract of sale become completely at the buyer's risk, the seller ceases to have any insurable interest, and the buyer acquires one. Thus, a contract for the sale of goods to be supplied on board a particular vessel may be so framed that the property in them and the risk of their loss do not pass to the buyer until a complete cargo has been loaded, in which case the buyer has no insurable interest until the complete cargo has been loaded; or the contract may be so framed that the property in and the risk as to any part of the goods pass to the buyer on shipment, in which case the buyer acquires an insurable interest on any part of the goods then shipped."

(emphasis supplied)

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24. We may now refer to the provisions of the Sale of Goods Act, 1930 relevant to the transfer of the property in goods to the purchaser specially in a f.o.b. transaction like the one in the instant case. Section 19 of the said Act provides that in a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred and that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

25. Sections 20 to 24 of the said Act prescribe rules for ascertaining the intention of the parties as to the time at which the property is to pass to the buyer. One of the said rules is that in unconditional contracts for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made irrespective of the fact that the time of payment of the price or the time for the delivery of the goods or both are postponed.

26. Yet another rule contained in Section 23 of the Act is that where the contract is for the sale of unascertained or future goods by description and goods of that description are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods passes to the buyer. So also where the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. Section 23(2) which stipulates that rule reads:

"23. (2) Delivery to carrier.—Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

27. Section 25 provides that:

"25. Reservation of right of disposal.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission, to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

28. Section 26 of the Act provides that unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Section 26 may at this stage be extracted:

"26. Risk prima facie passes with property.—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either buyer or seller as a bailee of the goods of the other party."

29. Section 39, inter alia, provides that delivery of the goods to a carrier whether named by the buyer or not, is prima facie deemed to be delivery of the goods to the buyer.

30. Sections 46 and 47 deal with unpaid seller's rights and lien and, inter alia, provide that the unpaid seller shall, subject to the provisions of the Act and of any law for the time being in force, have a lien on the goods for the price while he is in possession of them and that the seller can retain the possession of the goods until payment or tender of the price in situations where the buyer has become insolvent or goods have been sold on credit, but the term of credit has expired. The lien, however, stands terminated in terms of Section 49 of the Act when the goods are delivered to a carrier for the purpose of transmission to the buyer without reserving the right of disposal of the goods.

31. Coming to the case at hand, the contract of sale was on f.o.b. basis even when the contract of insurance proceeded on the basis that the transactions between the seller and the purchaser and meant to be covered by the policy would be on c.i.f. basis. The distinction between c.i.f. (cost, insurance and freight) and f.o.b. (free on board) contracts is well recognised in the commercial world. While in the case of c.i.f. contract the seller in the absence of any special contract is bound to do certain things like making an invoice of the goods sold, shipping the goods at the port of shipment, procuring a contract of insurance under which the goods will be delivered at the destination, etc., in the case of f.o.b. contracts the goods are delivered free on board the ship. Once the seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship in terms of the bill of lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer.

32. It is common ground that the seller had, in the case at hand, reserved no right or lien qua the goods in question. In the absence of any contractual stipulation between the parties the unpaid seller's lien over the goods recognised in terms of Sections 46 and 47 of the Sale of Goods Act, 1930 stood terminated upon delivery of the goods to the carrier. The goods were from that stage onwards held by the carrier at the risk of the buyer and the property in the goods stood vested in the buyer.

33. The principle underlying transfer of title in goods in f.o.b. contracts was stated by a Constitution Bench of this Court in B.K. Wadeyar v. Daulatram Rameshwarlal [AIR 1961 SC 311] . The question as to the transfer of title in the goods arose in that case in the context of a fiscal provision but the principle relating to the transfer of title in goods in terms of f.o.b. contract was unequivocally recognised. This Court held that in f.o.b. contracts for sale of goods, the property is intended to pass and does pass on the shipment of the goods. The National Commission was, therefore, right in holding that the seller had no insurable interest in the goods thereby absolving the Insurance Company of the liability to reimburse the loss, if any, arising from the misdelivery of such goods.

34. We consider it unnecessary to delve any further on this aspect of the matter for in our opinion the claim made by the shipper against the Insurance Company has been rightly rejected by the National Commission on the ground that the shipper had not observed utmost good faith while obtaining the insurance cover.

39. The National Commission has, in the instant case, recorded a clear finding the correctness whereof has not been disputed before us that the insurance cover obtained by the exporter envisaged goods being dispatched on c.i.f. basis whereas the goods were, in fact, sent on f.o.b. basis. This was a material departure which breached the duty of utmost good faith cast upon the exporter towards the Insurance Company. If the proposal for insurance had disclosed that the goods will be sent on f.o.b. basis, the question whether the supplier had any insurable interest in the goods and if he had what premium the Company would charge for the same may have assumed importance. Be that as it may, the duty to make a complete disclosure not having been observed by the exporter, the National Commission was justified in holding that the Insurance Company stood absolved of its liability under the contract and in dismissing the petition qua the said Company.

40. That brings us to the question whether the National Commission was justified in holding that the service rendered by the carrier was deficient, and if so, whether it was right in awarding rupee equivalent of US $1800 by way of compensation.

41. The National Commission has on appreciation of the material on record come to the conclusion that the consignment meant to be delivered to Pindikas was misdelivered and what was offered to Pindikas did not actually contain miniature paintings meant for the said consignee. That finding is, in our opinion, justified on the material on record from which it is evident that out of 122 cartons, 121 cartons were delivered to M/s Natural Selection International while the only remaining carton when checked in the presence of the General Consulate of India was found to contain steel furniture items. The inference, therefore, is that the carton containing miniature paintings had been misdelivered by the carrier who ought to have taken care to deliver the same to the consignee concerned. The National Commission has rightly rejected the contention that the carton was not properly marked making it difficult for the shipping company to separate the same from other cartons which were meant for M/s Natural Selection International.

42. There is indeed no room for us to interfere with the findings of the National Commission. The question, however, is whether the National Commission was justified in awarding rupee equivalent of US $1800 to the shipper by way of compensation. There are two errors which are evident in the order passed by the National Commission in that regard.

43. Firstly, the National Commission has instead of going by the number of packages entered in the bill of lading gone by the packages mentioned in the packing list. The bill of lading was the only document on the basis of which compensation could be determined against the carrier in terms of the provisions of the Carriage of Goods by Sea Act, 1925 and the Schedule thereto. Section 2 of the said Act provides that the Rules set out in the Schedule shall have effect in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India. Section 4 requires that every bill of lading or similar document of title issued in India to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by the Act. In terms of Rule 5 of Article IV neither the carrier nor the ship shall be liable for any loss or damage to or in connection with goods in excess of the amounts stipulated therein.

44. Rule 5 of Article IV to the extent the same is relevant for our purposes may be extracted at this stage:

"5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 666.67 special drawing rights per package or unit or two special drawing rights per kilogram of gross weight of the goods lost or damaged, whichever is higher, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading and as packed in such article of transport shall be deemed to be the number of packages or units for the purposes of this paragraph as far as these packages or units are concerned.

Neither the carrier nor the ship shall be entitled to the benefit of limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."

A careful reading of the above would show that in cases where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading and as packed in such article of transport shall be deemed to be the number of packages or units for purposes of Rule 5 as far as these packages or units are concerned.

45. It is not in dispute that 122 cartons dispatched by the shipper were consolidated in a container, nor is it disputed that there was only one package indicated in the bill of lading concerning the consignment meant for Pindikas. The National Commission could not go beyond the bill of lading and award compensation on the basis of the packing list which may have mentioned several packages consolidated in one bigger package, delivery whereof was acknowledged in the bill of lading. The Commission ought to have taken the number of packages to be only one as mentioned in the bill of lading.

46. The second error committed by the National Commission is equally manifest. The Commission appears to have gone by the unamended provisions of Rule 5 in which the amount of compensation was stipulated to be US $100 [Ed.: The amount of compensation in the unamended Rule 5 was stipulated to be 100l. per package.] per package. After the amendment of the Schedule in the year 1992 by Act 28 of 1993 the amount of compensation was to be paid in terms of special drawing rights. As noticed above the shipper would be entitled to the compensation of 666.67 special drawing rights per package or two special drawing rights per kilogram according to the gross weight of the goods lost or damaged whichever is higher. The single package meant for Pindikas weighed 200 kg. The amount of compensation payable by reference to the weight of the package would come to 400 special drawing rights. The amount of compensation actually payable would, however, be 666.67 special drawing rights being higher of the two amounts.

47. It was next argued that the shipper would be entitled to the value of the goods misdelivered which according to the shipper was not less than Rs 39,23,225. There is no merit in that submission. We say so because compensation by reference to the value of the goods lost or damaged can be claimed only if the nature or the value of such goods has been declared by the shipper before shipment and inserted in the bill of lading.

48. Even assuming that the nature and the valuation of the goods had been declared by the shipper before the shipment, the requirement of "insertion of the same in the bill of lading" was not satisfied in the present case. The bill of lading does not mention either the nature or the value of the goods. That being so, compensation of rupee equivalent of 666.67 special drawing rights was the only amount that could be awarded by the Commission to the shipper. Inasmuch as the Commission awarded US $1800 it committed a mistake that calls for correction.

49. In the result we dismiss CA No. 8276 of 2003 but partly allow CAs Nos. 3245 of 2005 and 6232 of 2004 to the extent that the amount of compensation payable to the shipper shall stand reduced to the rupee equivalent of 666.67 special drawing rights only. The order passed by the National Commission shall stand modified to the above extent leaving the parties to bear their own costs.

Shipping Corpn. of India Ltd. v. Bharat Earth Movers Ltd.

(2008) 2 SCC 79

S.B. Sinha, J

2. Application of the Indian Carriage of Goods by Sea Act, 1925 (for short "the Indian Act") vis-à-vis the (Japanese) Carriage of Goods by Sea Act, 1992 (for short "the Japanese Act") is in question in this appeal which arises out of a judgment and order dated 2-12-2004 passed by a Division Bench of the High Court of Judicature at Madras in OSA No. 247 of 2000 affirming the judgment and decree dated 7-3-2000 passed by a learned Single Judge thereof in CS No. 75 of 1996.

3. The appellant is an owner of a fleet of vessels. A consignment of six sets of sub-assemblies for PC 650 H.E. was entrusted by Respondent 1 for carriage thereof from Kobe, Japan to Madras. It contained 16 packages. It arrived at the port of Madras on 17-12-1994.

4. A part of the consignment was found in damaged condition. An inspection there for was made. Some damage was noticed in five cases. On the premise that the damage of short delivery had been caused due to negligence on the part of the employees of the appellant, a suit was filed on the Original Side of the Madras High Court. Claim of damages, however, was therein confined to two cases only viz. Cases Nos. 00002 and 0013. In the said suit, the following relief was prayed for:

"(a) A sum of Rs 16,72,143.87 with interest from the date of plaint till the date of realisation (interest of 18%) at 18% p.a. as the transaction being commercial one under Section 34 CPC."

5. In the written statement, the respondents inter alia pleaded "limited liability" on their part.

6. A learned Single Judge of the said Court held the appellant liable for payment of damages being responsible for causing damage and loss to the consignment which had occurred at a time when the cargo was in its charge.

7. In regard to the contention of the appellant that the contract of carriage having been concluded in Japan, the Japanese Act shall apply and not the Indian Act, it was opined:

"Another contention is raised on the side of the defendant that the Indian Carriage of Goods by Sea Act has been amended by the Multimodal Transportation of Goods Act, 1993 and the maximum liability of the carrier per package is not 100 as contended by the plaintiff and the maximum liability is 666.67 special drawing rights per package or two special drawing rights per kg of gross weight of the goods lost or damaged, whichever is higher. Calculated thus, according to the defendant, the maximum liability of the defendant will be only Rs 1,31,471.11. Even assuming that the liability of the defendant has to be calculated thus, the liability must be calculated taking into consideration the weight of 16 cases which are governed by Ext. A-3, bill of lading and in this case the liability will be more than what is claimed in the plaint. Therefore, the defendant cannot resist the claim of the plaintiff on this ground and the contract is governed by only the Indian Carriage of Goods by Sea Act. Therefore, on Issues 6 and 7 I hold that the contract is governed by the Indian Carriage of Goods by Sea Act and the defendant is liable to the extent of the plaintiff's claim and these two issues are therefore answered against the defendant."

8. The Division Bench of the High Court in an intra-court appeal preferred by the appellant herein affirmed the said finding relying on or on the basis of Clause 6 of the bill of lading, stating:

"On the basis of above Clause 6, the submission of the learned counsel for the appellant-defendant, that the Japanese Carriage of Goods by Sea Act is applicable to the facts of the case, cannot be countenanced."

9. A notice was issued by this Court confined to the question as to whether the appellant has a limited liability to the claim of the respondents.

10. Mr C.A. Sundaram, learned Senior Counsel appearing on behalf of the appellant, placed before us the relevant provisions of the Indian Act, the Japanese Act as also the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague Rules) to contend that as the price of the cargo had not been disclosed in the bill of lading, the liability of the appellant must be held to be confined only to the amount specified therein. It was urged that the High Court committed a serious error in holding that the Indian law would be applicable.

11. Mr P.R. Sikka, learned counsel appearing on behalf of the respondents, however, supported the impugned judgment.

12. Before embarking on the questions raised before us, we at the outset may observe that the provisions of the Multimodal Transportation of Goods Act, 1993 whereto reference has been made by the parties before the High Court are not applicable as admittedly the mode of transport was by sea only and did not involve any multimodal transportation as defined in Section 2(k) thereof.

13. The scope of the Japanese Act is stated in Article 1 thereof stating:

"1. The provision of this Act (except Article 20bis) shall apply to the carriage of goods by ship from a loading port or to a discharging port, either of which is located outside Japan, and Article 20bis shall apply to the carrier's and his servant's liability for damage to goods caused by their tort."

14. Para 4 of Article 2 defines "one unit of account" to mean "the amount equivalent to one special drawing right as defined in Para (1) of Article 3 of the International Monetary Fund Agreement". Article 4 confers a liability upon the carrier stating that it shall not be relieved therefrom unless exercise of due diligence under the said article is proved.

15. The provision regarding limited liability is contained in Article 13 of the Japanese Act, which reads as under:

"13. (1) The carrier's liability for a package or unit of the goods shall be the higher of the following:

(1) an amount equivalent to 666.67 units of account;

(2) an amount equivalent to 2 units of account per kilo of gross weight of the goods lost, damaged or delayed.

(2) The unit of account used in each item of the preceding paragraph shall be the final publicised one at the date on which the carrier pays damages in respect of the goods.

(3) Where a container, pallet or similar article of transport (which is referred to as 'containers and etc.' in this paragraph) is used for the transportation of the goods, the number of containers, etc. or units shall be deemed to be the number of the packages or units of the goods for the purpose of the preceding paragraph unless the goods' number or volume or weight is enumerated in the bill of lading…."

16. The Indian Act, however, in Section 2 provides for the application of Rules in the following terms:

"2. Application of Rules.—Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as 'the Rules') shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India."

17. The Schedule appended thereto provides for the rules relating to bills of lading. Article IV provides for rights and immunities, the relevant portion whereof reads as under:

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of Para 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section."

Para 5 of Article IV reads thus:

"5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 1001 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

18. We may also notice that under the special drawing rights as contained in the International Monetary Fund Special Drawing Rights would mean 1.00XDR as equivalent to 64.0948 INR and 666.67XDR as equivalent to 42,730.20 INR.

19. Clause 5 of the Hague Rules, to which both India and Japan are parties, reads as under:

"5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier."

20. Having noticed the relevant statutory provisions, we may also notice the relevant terms and conditions of the bill of lading which are as under:

"6. Liability for loss or damage where the stage is not known.—When in accordance with Condition 4 hereof, the CTO is liable to pay compensation in respect of loss or damage to the goods and the stage of transport where the loss or damage occurred is not known, the liability of the CTO in respect of such loss or damage shall not exceed the monetary limit indicated in this regard, in any international convention or national law that would have applied, if the contract was for the carriage of goods from a seaport in India and had been covered by an ocean bill of lading. However, the CTO shall not in any case be liable for an amount greater than the actual loss to the person entitled to make the claim.…

7. Liability for loss or damage where the stage is known.—(A) When in accordance with Condition 4 hereof, the CTO is liable to pay compensation in respect of loss or damage to the goods and the stage of transport where the loss or damage occurred is known, the liability of the CTO in respect of such loss or damage shall be determined by the provisions contained in any international convention or national law, which provisions would have applied if the claimant had made a separate and direct contract with the CTO in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which may be issued in order to make such international convention or national law applicable.…"

21 [Ed.: Para 21 corrected vide Corrigendum No. F.3/Ed.B.J./1/2008 dated 8-1-2008.] . A bare perusal of Section 2 of the Indian Act would clearly demonstrate that the same applies to the carriage of goods by sea in ships carrying goods from any port in India to any other port whether in or outside India which would mean that the Indian Act shall apply only when the carriage of goods by sea in ships takes place from a port situate within India and not a port outside India. The Japanese Act, on the other hand, applies in a situation where carriage of goods by a ship is either from a loading port or to a discharging port, either of which is located outside Japan. Therefore, the Japanese Act will clearly be applicable in the instant case.

22. The High Court, as noticed hereinbefore, applied the provisions of the Indian law. We may notice that Clause 6 of the bill of lading merely raises a legal fiction. It applies to a case where the place of occurrence of loss or damage is not known. It merely provides that in such an event the quantum of loss shall not exceed the monetary limit provided for in any international convention or national law.

23. No reason has been assigned in support of its findings by the High Court. Clause 7 of the bill of lading also should be read with Clause 6 thereof. In this case, the vessel sailed from Japan; its destination being Chennai.

24. As the originating port is outside India, Section 2 of the Indian Act, as noticed hereinbefore, will have no application. The High Court, in our opinion, misread the said provision.

25. The provisions noticed hereinbefore, whether of the Japanese Act or the Indian Act or the Hague Rules, provide for a limited liability. Contention of the appellant had been rejected by the High Court inter alia on the premise that the respondent-plaintiff was entitled to damages higher than the maximum liability provided for therein as the quantum of damages was to be calculated upon taking into consideration the weight of all the 16 cases and not only of two cases.

27. A contention has been raised before us for the first time that the value of the goods had been declared in the bill of lading. It is based on the premise that bill of lading refers to the invoice. We cannot accept the said contention. Invoice is not a part of the bill of lading. The value of the goods is required to be stated in the bill of lading so as to enable the shipping concern to calculate the quantum of freight. It cannot, in absence of any statutory provisions, be held to be incorporated therein by necessary implication or otherwise.

26. With respect, the approach of the High Court is wrong. If the respondent-plaintiff confined its claim of damages only for two cases, there was no room for making the observation that the liability must be calculated taking into consideration the weight of the 16 cases. Even in support of the said conclusion, no reason has been assigned. The discussions of the High Court end with the said finding which apparently is contrary to the statutory provisions.

28. We, therefore, are of the opinion that the liability of the appellant being limited and that too in respect of the two cases, the matter should be considered afresh in the light of the observations made hereinbefore by the learned Single Judge. To the aforementioned extent, the judgments and decrees of the High Court are set aside.

29. The appeal is allowed to the aforementioned extent. There shall, however, be no order as to costs.

Humboldt Wedag India Pvt. Ltd. v. Dalmia Cement Ventures Ltd.

2010 SCC OnLine Del 3383

Vikramajit Sen, J.:— This Appeal challenges the legality of the Order dated 4.8.2010 passed by the learned Single Judge under Section 9 of the Arbitration & Conciliation Act, 1996 (A&C Act for short) restraining Respondent No. 2 from invoking the subject Bank Guarantees, viz. dated 19.3.2008 for '2,50,00,000/- and 26.3.2008 for' 14,10,80,000/-, aggregating to '16,60,80,000/-. By Order dated 24.9.2009, the learned Single Judge then seized of the docket, observed that - "the contract awarded to the petitioner was cancelled by the respondent due to recession. The respondent had given advances to the petitioner to the extent the petitioner has executed the bank guarantee in favour of the respondent. There is no doubt that in view of the cancellation of the contract, the petitioner would be liable to recover expenses/liability in terms of the contract from the respondent. Looking into the high cost (around Rs. 27 lac) of maintenance of bank guarantee of Rs. 16,60,80,000/- and that the petitioner has staked a claim of Rs. 28 crores, I consider it would be appropriate that the petitioner instead of giving a bank guarantee of full amount of Rs. 16,60,80,000/- gives a bank guarantee of Rs. 9 crore so as to reduce the expenses of the petitioner, á. The respondent shall not encash this bank guarantee till further orders. The interim order passed is conditional on furnishing fresh bank guarantee". By the impugned Order dated 4.8.2010, the succeeding learned Single Judge has been pleased to "dismiss the present petition and direct the petitioner to provide further bank guarantee in the sum of Rs. 7,60,80,000/- within a period of four weeks from today on the same terms and conditions on which the petitioner's earlier bank guarantee were provided. The bank guarantee of Rs. 9 crores furnished by the petitioner and the additional bank guarantee shall be kept alive till the passing of further orders by the arbitral tribunal. The restraint against the encashment of the bank guarantee contained in the order dated 24.09.2009 stands vacated".

2. At the time of the hearings before us, it was admitted that the Bank Guarantee for Rs. 9,00,00,000/- (nine crores) has been invoked and payment of this amount has been received in the coffers of the Respondent. We are, therefore, now concerned only with the Bank Guarantee for the sum of Rs. 7,60,80,000/- required to be furnished as per the impugned Order.

3. The facts of the case are that the parties had entered into a contract pertaining to the manufacture and supply of Raw Mill, Pyro Processing, Clinker Mill Systems for 4500 tpd Split located cement project in Belgaum, Gulburga 1, Gulburga 2 & Meghalaya. The Appellant was the supplier and Respondent No. 1 was the purchaser. The contract for both design and engineering as well as equipment supply was Rs. 166.08 crores; after amendment on 15.9.2008, the price was reduced to Rs. 159.08 crores. Simultaneous with the Appellant furnishing Bank Guarantees for the aforementioned Rs. 16,60,80,000/-, Respondent No. 1 paid Rs. 96,93,100/- on 23.5.2008 and Rs. 62,14,900/- on 24.9.2008. The subject Contract contains a Clause which sets out that neither party shall be considered to be in default with respect to its obligations under the Contract to the extent that the default is due to any event of force majeure. However, no event of force majeure was to relieve either party from liability for an obligation which had arisen before its occurrence. Clause 26 of the contract protects the rights of the Respondent to terminate it by thirty days' notice in which contingency "a reasonable amount in respect of loss of profit not exceeding 10% of the total amount due under the Contract to the extent that such profit has not already been paid" is provided for. We are not concerned with the claim for damages. It bears repetition that the Appellant has furnished Bank Guarantee for the total sum of Rs. 16,60,80,000/- and, in return, has received this very sum in cash from the Respondent as an advance.

4. The salient stipulation in the two Bank Guarantees read thus:—

We, Deutsche Bank AG, having its Registered Office at 222, Kodak House, Dr. D.N. Road, Fort, Mumbai - 400001 (hereinafter referred to as the 'Bank', which expression shall unless repugnant to the context or meaning thereof mean and include its successors in interest, executors, administrators and permitted assigns), at the request of the Supplier, hereby irrevocably and unconditionally guarantee and undertake to pay you, Dalmia Cement Ventures Ltd., the Purchaser, without demur, dispute or delay, on your first written demand, an amount or amounts not exceeding a total sum of Rs. 14,10,80,000/- (INR Fourteen Crores Ten Lacs and Eighty Thousands only), provided that you confirm to us at the same time in writing, that the Supplier has not fulfilled all or any of his Contractual Obligations as stipulated in the Contract including but not limited to delivery of the agreed quantity and/or the shipment of the Product on the date agreed upon with the Purchaser. The liability of the Bank as contained herein shall automatically get reduced proportionately to the value of such parts of the Product (including all machinery and equipment) that may have been successfully delivered as certified by the Purchaser based on which the advance or on account amount paid by the Purchaser have been adjusted in the corresponding invoices of the Supplier raised with respect to the Contract. This Bank Guarantee shall expire latest on 04th July, 2009 (Guarantee Expiry Date), unless the Purchaser discharges the Guarantee earlier.

(emphasis supplied)

5. By letter dated 17.11.2008, Respondent No. 1 informed the Appellant that-

"Due to the unforeseen financial crisis across the world, leading to difficulties in financial closures of Projects, we are canceling our Order for Raw Mill, Cement Mill for Plant 3 and Pyro for Plant 4. … The Raw Mill, Cement Mill and Pyro of Plant 1 and the Raw Mill, Cement Mill of Plant 2 are being presently put on "Hold" due to the uncertainties in the economy". Thereafter, there have been several exchanges of correspondence. This constrained the Appellant to file the aforementioned Petition under Section 9 of the A&C Act on 3.7.2009. We have already narrated the substance of the Orders dated 24.9.2009 as well as the impugned Order dated 4.8.2010.

6. Eventually, by letter dated 20.8.2010, Respondent No. 1 informed its Banker/Respondent No. 2 that the contract between the parties had been terminated. A brief summation of Court proceedings in OMP No. 343/2009 was given. The Bank Guarantee for the sum of Rs. 9,00,00,000/- was invoked, stating - "we confirm that the Supplier has not fulfilled its contractual obligations". The sum of Rs. 9,00,00,000/- has been paid by Respondent No. 2 to Respondent No. 1. The Bank Guarantee for the sum of Rs. 7,60,80,000/- furnishable by the Appellant in favour of Respondent No. 1 in compliance with the impugned Order is not yet furnished.

7. The law regarding invocation/encashment of Letters of Credit and Bank Guarantees has been crystallized as far back as in 1970 in Tarapore and Co., Madras v. V.O. Tractors Export Moscow, (1969) 1 SCC 233 : AIR 1970 SC 891. Their Lordships elaborately and perspicuously explained the scope and ambit of judicial interference in such matters in these words—

The scope of an irrevocable letter of credit is explained thus in Halsbury's Laws of England (Vol. 34, Paragraph 319 at page 185):

"It is often made a condition of a mercantile contract that the buyer shall pay for the goods by means of a confirmed credit, and it is then the duty of the buyer to procure his bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to accept drafts drawn upon it for the price of the goods, against tender by the seller of the shipping documents. The contractual relationship between the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued; and as between the seller and the bank, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. The contract thus created between the seller and the bank is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the bank's undertaking to the seller, which is absolute. Thus the bank is not entitled to rely upon terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefor; and, conversely, the buyer is not entitled to an injunction restraining the seller from dealing with the letter of credit if the goods are defective."

Chalmers on "Bills of Exchange" explains the legal position in these words

"The modern commercial credit serves to interpose between a buyer and seller a third person of un-questioned solvency, almost invariably a banker of international repute; the banker on the instructions of the buyer issues the letter of credit and thereby undertakes to act as paymaster upon the seller performing the conditions set out in it. A letter of credit may be in any one of a number of specialised forms and contains the undertaking of the banker to honour all bills of exchange drawn thereunder. It can hardly be over-emphasised that the banker is not bound or entitled to honour such bills of exchange unless they, and such accompanying documents as may be required thereunder, are in exact compliance with the terms of the credit. Such documents must be scrutinised with meticulous care, the maxim de minimis non curat lex cannot be invoked where payment is made by the letter of credit. If the seller has complied with the terms of the letter of credit, however, there is an absolute obligation upon the banker to pay irrespective of any disputes there may be between the buyer and the seller as to whether the goods are up to contract or not"

Similar are the views expressed in 'Practice and Law of Banking' by H.B. Sheldon, "the Law of Bankers Commercial Credits" by H.C. Gutteridge, "the Law relating to Commercial Letters of Credit" by A.G. Devis" "the Law Relating to Bankers" Letters of Credit" by B.C. Mitra and in several other text books read to us by Mr. Mohan Kumaramangalam, learned Counsel for the Russian Firm. The legal position as set out above was not controverted by Mr. M.C. Satalvad, learned Counsel for the Indian Firm. So far as the Bank of India is concerned it admitted its liability to honour the letter of credit and expressed its willingness to abide by its terms. It took the same position before the High Court.

……..

10. A case somewhat similar to the one before us came up for consideration before the Queens Bench Division in England in HamzehWalas and Sons v. British Imex Industries Ltd., 1958-2 QB 127. Therein the plaintiffs, a Jordanian firm contracted to purchase from the defendants, a British firm, a large quantity of reinforced steel rods, to be delivered in two installments. Payment was to be effected by opening in favour of the defendants of two confirmed letters of credit with the Midland Bank Ltd., in London, one in respect of each installment. The letters of credit were duly opened and the first was realised by the defendants on the delivery of the first installment. The plaintiffs complained that installment was defective and sought an injunction to bar the defendants from realizing the second letter of credit. Donovan, J., the Trial Judge refused the application. In appeal Jenkins, Sellers and Pearce L., JJ. Confirmed the decision of the Trial Judge. In the course of his judgment Jenkins, L.J., who spoke for the Court observed thus:

“We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this Court in the present case to interfere with that established practice.

There is this to be remembered, too. A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is of no mean advantage when goods manufactured in one country are being sold in another. It is, furthermore, to be observed that vendors are often reselling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice is - and I think it was followed by the defendants in this case—to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute as between the vendor and the purchaser was to have the effect of “freezing” if I may use that expression the sum in respect of which the letter of credit was opened.”

In Urquhart Lindsay and Co. Ltd. v. Eastern Bank Ltd., 1922-1 KB 318 the King's Bench held that the refusal of the defendants bank to take and pay for the particular bills on presentation of the proper documents constituted a repudiation of the contract as a whole and that the plaintiffs were entitled to damages arising from such a breach. It may be noted that in that case the price quoted in the invoices was objected to by the buyer and he had notified his objection to the bank. But under the terms of the letter of credit the bank was required to make payments on the basis of the invoices tendered by the seller. The court held that if the buyers had an enforceable claim that adjustment must be made by way of refund by the seller and not by the way of retention by the buyer.

11. Similar opinions have been expressed by the American Courts. The leading American case on the subject is Dulien Steel Products Inc., of Washington v. Bankers Trust Co., Federal Reporter 2nd Series, 298 p. 836. The facts of that case are as follows:

The plaintiffs, Dulien Steel Products Inc., of Washington, contracted to sell steel scrap to the European Iron and Steel Company. The transaction was put through Marco Polo Group Project, Ltd. who were entitled to commission for arranging the transaction. For the payment of the commission to Marco Polo, plaintiffs procured an irrevocable letter of credit from Seattle First National Bank. As desired by Marco Polo this letter of credit was opened in favour of one Sica. The defendant-bankers confirmed that letter of credit. The credit stipulated for payment against (1) a receipt of Sica for the amount of the credit and (2) a notification of Seattle Bank to the defendants that the plaintiffs had negotiated documents evidencing the shipment of the goods. Sica tendered the stipulated receipt and Seattle Bank informed the defendants that the Dulien had negotiated documentary drafts. Meanwhile after further negotiations between the plaintiffs and the vendees the price of the goods sold was reduced and consequently the commission payable to Marco Polo stood reduced but the defendants were not informed of this fact. Only after notifying the defendants about the negotiation of the drafts drawn under the contract of sale, the Seattle Bank informed the defendants about the changes underlying the transaction and asked them not to pay Sica the full amount of the credit. The defendants were also informed that Sica was merely a nominee of Marco Polo and has no rights of his own to the sum of the credit. Sica, however, claimed payment of the full amount of the credit. The defendants asked further instructions from Seattle Bank but despite Seattle Bank's instructions decided to comply with Sica's request. After informing Seattle Bank of their intention, they paid Sica the full amount of the credit. Plaintiffs thereupon brought an action in the District Court of New York for the recovery of the moneys paid to Sica. The action was dismissed by the trial Court and that decision was affirmed by the Court of Appeals. That decision establishes the well known principle that the letter of credit is independent of and unqualified by the contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule Courts refrain from interfering with that autonomy.

8. In United Commercial Bank v. Bank of India, (1981) 2 SCC 766 : AIR 1981 SC 1426 the Apex Court has reiterated that Courts ought not to grant injunctions restraining the performance of the contractual obligations flowing out of a Letter of Credit or a Bank Guarantee between one Bank and another. It observed that

The opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods which imposes on the banker an absolute obligation to pay. A banker issuing or confirming an irrevocable credit usually undertakes to honour drafts negotiated, or to reimburse in respect of drafts paid, by the paying or negotiating intermediate banker and the credit is thus in the hands of the beneficiary binding against the banker. A letter of credit constitute the sole contract with the banker and a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer an seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit. The banker owes a duty to the buyer to ensure that the documents tendered by the sellers under a credit are complied with those for which the credit calls and which are embodied in terms of paying or negotiating bank. The description of the goods in the relative bill of exchange must be the same description in the letter of credit, that it, the goods themselves must in each be described in identical terms, even though the goods differently described in the two documents are, in fact, the same. It is the description of the goods that is all important and if the description is not identical it is the paying bank's duty to refuse payment.

9. The Respondent has placed reliance on U.P. Coop. Federation v. Singh Consultants & Engineers (P) Ltd., (1988) 1 SCC 174 which also enunciates the law on this subject. The Lordships opined thus:—

45. The letter of credit has been developed over hundreds of years of international trade. It was most commonly used in conjunction with the sale of goods between geographically distant parties. It was intended to facilitate the transfer of goods between distant and unfamiliar buyer and seller. It was found difficult for the seller to rely upon the credit of an unknown customer. It was also found difficult for a buyer to pay for goods prior to their delivery. The Bank's letter of credit came into existence to bridge this gap. In such transactions, the seller (beneficiary) received payment from issuing bank when he presents a demand as per terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves. The courts, however, carved out an exception to this rule of absolute independence. The courts held that if there has been fraud in the transaction the bank could dishonour beneficiary's demand for payment. The courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else.

46. It was perhaps for the first time the said exception of fraud to the rule of absolute independence of the letter of credit has been applied by Shientag, J. in the American case of Sztejn v. J. Henry Schroder Banking Corporation (31 NYS 2d 631). Mr. Sztejn wanted to buy some bristles from India and so he entered into a deal with an Indian seller to sell him a quantity. The issuing Bank issued a letter of credit to the Indian seller that provided that, upon receipt of appropriate documents, the bank would pay for the shipment. Somehow, Mr. Sztejn discovered that the shipment made was not crates of bristles, but creates of worthless material and rubbish. He went to his bank which probably informed him that the letter of credit was an independent undertaking of the bank and it must pay.

……..

53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous seller, that is, the seller who is responsible for the fraud. But, the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an egregious nature as to vitiate the entire underlying transaction. It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction.

10. In Hindustan Steel Works Construction Ltd. v. Tarapore& Co., AIR 1996 SC 2268 : (1996) 5 SCC 34, the following observations are to be found:

We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.

11. Mr. Jayant Bhushan has contended that the exposition of the law made by the Supreme Court does not mandate that the assertions articulated in the Instrument of Invocation have to be made good to the concerned Bank by the Claimant; a Statement of Claim is all that is envisaged by law. He has relied on U.P. State Sugar Corporation v. Sumac International Limited, AIR 1997 SC 1644 : (1997) 1 SCC 568 and Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd., (1997) 6 SCC 450 in this regard, which we shall shortly advert to.

12. In Sumac International, the circumstances in which the invocation of a Bank Guarantee or payments made pursuant thereto could be interdicted, had been Restated. While spelling out the essentials of fraud and/or irretrievable injustice in this context, the Apex Court had recorded the following observations which have been read before us by Mr. Jayant Bhushan, learned Senior Counsel for Respondent No. 1, to posit that fraud stands restricted or confined only to the invocation of the Bank Guarantee:—

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

……..

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the ItekCorpn. case, 566 Fed Supp 1210. In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This intention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Itek case (supra) there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

15. Our attention was invited to a number of decisions on this issue—among them, to Larsen & Toubro Ltd. v. Maharashtra SEB, (1995) 6 SCC 68 and Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd., (1995) 6 SCC 76 as also to National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd., (1995) 4 SCC 515. The latest decision is in the case of State of Maharashtra v. National Construction Co., (1996) 1 SCC 735 where this Court has summed up the position by stating:

The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee.

13. Reference may also be made by Mr. Bhushan to the observations of B.N. Kirpal, J. (as the Chief Justice of India then was) in Dwarikesh, and the terse deprecation contained therein to the Courts' interdicting the normal operation of Bank Guarantees and Letters of Credit.

21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken v. Indian Charge Chrome, Larsen & Toubro Ltd. v. Maharashtra SEB, Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. and U.P. State Sugar Corpn. v. Sumac International Ltd. The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. As follows: (SCC p. 574, para 12)

The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. In Bolivinter Oil SA v. Chase Manhattan Bank are apposite:

… The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.

The aforesaid passage was approved and followed by this Court in U.P. Co-op. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.

22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

28. Coming to the allegation of fraud, it is an admitted fact that in the plaint itself, there was no such allegation. It was initially only in the first application for the grant of injunction that in a paragraph it has been mentioned that the appellant herein had invoked the bank guarantee arbitrarily. This application contains no facts or particulars in support of the allegation of fraud. A similar bald averment alleging fraud is also contained in the second application for injunction relating to Bank Guarantee No. 40/47. This is not a case where Defendant 1 had at any time alleged fraud prior to the filing of injunction application. The main contract, pursuant to which the bank guarantees were issued, was not sought to be avoided by alleging fraud, nor was it at any point of time alleged that the bank guarantee was issued because any fraud had been played by the appellant. We have no manner of doubt that the bald assertion of fraud had been made solely with a view to obtain an order of injunction. In the absence of established fraud and not a mere allegation of fraud and that also having been made only in the injunction application, the court could not, in the present case, have granted an injunction relating to the encashment of the bank guarantees.

14. Mr. PreeteshKapur, learned counsel for the Appellant, has placed reliance on Hindustan Construction Co. v. State of Bihar, (1999) 8 SCC 436. In that case, the concerned Bank had agreed "unconditionally and irrevocably to guarantee as primary obligator and not as surety merely, the payment of the Executive Engineer …. on his first demand without his first claim to the contractor, in the amount not exceeding Rs. 10,00,000 (Rupees Ten lakhs only) in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilization loan from the contractor under the contract". It was in those circumstances that their Lordships enunciated the law in the following manner:—

14. This condition clearly refers to the original contract between HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "advance mobilization loan", then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to "advance mobilization loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the "advance mobilization loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "mobilization advance" would become payable on demand. The bank guarantee thus could be invoked only in the circumstances referred to in clause 9 where under the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the bank guarantee.

…

22. We have scrutinised the facts pleaded by the parties in respect of both the bank guarantees as also the documents filed before us and we are, prima facie, of the opinion that the lapse was on the part of the defendants who were not possessed of sufficient funds for completion of the work. The allegation of the defendants that HCCL itself had abandoned the work does not, prima facie, appear to be correct and it is for this reason that we are of the positive view that the "special equities" are wholly in favour of HCCL.

15. It will be apposite to allude to Federal Bank Limited v. V.M. Jog Engineering Limited, (2001) 1 SCC 663 wherein the Apex Court had recorded the following exposition of the law—

In several judgments of this Court, it has been held that courts ought not to grant injunction to restrain encashment of bank guarantees or letters of credit. Two exceptions have been mentioned - (i) fraud, and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39 Rule 1 CPC can be issued. It has also been held that the contract of the bank guarantee or the letter of credit is independent of the main contract between the seller and the buyer. This is also clear from Articles 3 and 4 of UCP (1983 Revision). In case of an irrevocable bank guarantee or letter of credit the buyer cannot obtain injunction against the banker on the ground that there was a breach of the contract by the seller. The bank is to honour the demand for encashment if the seller prima facie complies with the terms of bank guarantee or the letter of credit, namely, if the seller produces the documents enumerated in the bank guarantee or the letter of credit. If the bank is satisfied on the face of the documents that they are in conformity with the list of documents mentioned in the bank guarantee or the letter of credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment. While doing so it must take reasonable care. It is not permissible for the bank to refuse payment on the ground that the buyer is claiming that there is a breach of contract. Nor can the bank try to decide this question of breach at that stage and refuse payment to the seller. Its obligation under the document having nothing to do with any dispute as to breach of contract between the seller and the buyer.

16. It is evident that despite the clarity and consistency in the decisions of the Hon'ble Supreme Court, injunctions for the encashment of Bank Guarantees and Letters of Credit are nevertheless granted. Very recently in National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410, the Apex Court again adumbrated the law on this subject in the following passage:

It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an "on-demand bank guarantee" is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee of if there is any fraud. Courts cannot restrain invocation of an "on-demand guarantee" in accordance with its terms by looking at terms of the underlying contract. The existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee. The bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The bank guarantee was enforced because the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the bank guarantee was against the terms of the bank guarantee. If it was in terms of the bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court.

17. From the above discussion, it is manifestly clear that there is no room for debate that the Courts are not to interfere with the encashment of the Letter of Credit or the Bank Guarantee unless the case falls within the purview of exceptions laid down by the Apex Court. The first exception which has been carved out by the Courts is that the fraud perpetrated must be of egregious nature meaning that the said fraud would lead to gross injustice which shakes the conscience of the Court and the said fraud should be known to the parties and the concerned Bank. If the said fraud is manifest or evident, the Court can restrain the encashment of the bank guarantee. In U.P. Co-operation Federation also it was held that the fraud pleaded must be of an egregious nature so as to vitiate the entire underlying transaction of the Bank Guarantee. It is fraud of the beneficiary and not the fraud of somebody else that would impel the Court to grant the Order of injunction as asked for.

18. To counter to the argument of Mr. Jayant Bhushan to the effect that fraud has been restricted by the Supreme Court to the opening of the Bank Guarantee, Mr. Kapur has drawn our attention to paragraph 18 of Hindustan Steel Works:—

18. What Mukherji, J. has stated in para 34 of his judgment, namely, that: "It is only in exceptional cases that is to say in case of fraud or in case irretrievable injustice be done, the courts should interfere" is really the ratio of the decision of this Court in U.P. Co-op. a Federation Ltd.(1988) 1 SCC 174. Therefore, fraud cannot be said to be the only exception. In a case where the party approaching the court is able to establish that in view of special equities in his favour if injunction as requested is not granted then he would suffer irretrievable injustice, the court can and would interfere. It may be pointed out that fraud which is recognised as an exception is the fraud by one of the parties to the underlying contract and which has the effect of vitiating the entire underlying transaction. A demand by the beneficiary under the bank guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the underlying contract but it may become so because of subsequent events or circumstances. We see no good reason why the courts should not restrain a person making such a fraudulent demand from enforcing a bank guarantee.

Predicated on this paragraph, it is posited that fraud throughout the dealings between the parties is relevant and there is no basis or justification for restricting fraud only to the opening of the Bank Guarantee, as Mr. Bhushan has sought to contend. Having carefully cogitated upon the contrary contentions, our understanding of the law is that any fraud committed at any stage of the dealings between the parties is a relevant factor to be kept in perspective before granting or declining an injunction against the invocation of the Bank Guarantee. Of course, the fraud must be of egregious proportions so as to warrant the exceptional and extraordinary interference with the contractual obligations resting on a Bank Guarantee. It must be borne in mind that in almost all cases only the beneficiary and the banker are privy to an unconditional Bank Guarantee. We are mindful of the fact that it is Respondent No. 1 who had put an end to a part of a contract and kept another part in abeyance. It is trite that fraud vitiates all solemn acts. Prima facie, therefore, it was incorrect and fraudulent for Respondent No. 1 to state to its Banker/Respondent No. 2 that the Appellant had not fulfilled its contractual obligations. Accordingly, it appears to us that the learned Single Judge has committed an error of law in coming to the conclusion that a fraud of egregious nature had not been disclosed by the Appellant which warranted the passing of the injunction prayed for.

19. We must also deal with the argument made by Mr. Kapur that the Order dated 24.9.2009 could not have been varied by the impugned Order. The earlier Order as has already been adumbrated, permitted the Appellant to substitute the two Bank Guarantees by a fresh Bank Guarantee of Rs. 9,00,00,000/-, in respect of which Respondent No. 1 had been restrained from taking action for its encashment. Mr. Bhushan started with his submission that a restitution can always be granted by a Court on the strength of Kavita Trehan v. Balsara Hygiene Products Ltd., (1994) 5 SCC 380 and South Eastern Coalfields Ltd. v. State of MP, (2003) 8 SCC 648 and, therefore, it was of little consequence whether the initial Order was Interim or Final. Mr. Bhushan is also right in arguing that the earlier Order would have been Final had the Petition itself been disposed of on that date. The argument of Mr. Kapur that the Order dated 24.9.2009 is inviolable and unchangeable is rejected.

20. There is no gainsaying that injunctions are in the species of equitable relief. At the present moment, as against the advance/mobilization payment of the supply contract, a sum of Rs. 9,00,00,000/- stands adjusted. Theoretically and conceivably, either party may succeed in proving their claims against the other. It does not appear to us to be equitable to ordain that the party rescinding the contract should be placed in a position where the advance paid should be restituted to it in full measure. So far as the Appellant/Supplier is concerned, he is, at present, retaining the sum of Rs. 7,60,80,000/- albeit that a Bank Guarantee for this very sum has been made available.

21. We, therefore, direct the Appellant to furnish a Bank Guarantee of Rs. 7.60 crore and to ensure that the said Bank Guarantee of Rs. 7,60,80,000/- remains current for a period of ninety days after the passing of the Arbitral Award. We clarify that the Arbitral Tribunal shall be free to pass directions in respect of the Bank Guarantee as it considers expedient, lawful and just. The concluding paragraph of the impugned Order is ambiguous on the question of whether the Bank Guarantee in the sum of Rs. 7,60,80,000/- can be invoked or not. If the learned Single Judge was of the opinion that it could be encashed, he need not have ordered for the furnishing of a Bank Guarantee and could easily have clarified the position or simply directed the Petitioner/Appellant to pay this amount to the Respondent. In this way, restitution would have been brought about. We think that the learned Single Judge had intended that the Bank Guarantee for Rs. 7,60,80,000/- should be kept alive to await the Orders of the Arbitral Tribunal. This, in any case, seems to us to maintain and balance the equities between the parties.

22. The Appeal along with pending application is disposed off in these terms. There shall be no order as to costs.